
THE UNIVERSITY OF
CHICAGO

THE UNIVERSITY OF CHICAGO

Name: Natalia Angelina McLaren
Student ID: 12334928

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
Three-Year J.D./M.B.A.

External Education

Dartmouth College
Hanover, New Hampshire
Bachelor of Arts 2020

Dartmouth College
Hanover, New Hampshire
Bachelor of Arts Hons 2020

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	179
LAWS	30211	Civil Procedure William Hubbard	4	4	178
LAWS	30611	Torts Adam Chilton	4	4	177
LAWS	30711	Legal Research and Writing Hannah Shaffer	1	1	180

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Sonja Starr	4	4	177
LAWS	30411	Property Lee Fennell	4	4	179
LAWS	30511	Contracts Eric Posner	4	4	176
LAWS	30711	Legal Research and Writing Hannah Shaffer	1	1	180

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Hannah Shaffer	2	2	177
LAWS	30713	Transactional Lawyering David A Weisbach	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Farah Peterson	3	3	180
LAWS	57507	Managerial Psychology Ayelet Fishbach	3	3	180

Summer 2022

Course		Description	Attempted	Earned	Grade
BUSN	30000	Financial Accounting J Douglas Hanna	3	3	B-
BUSN	41000	Business Statistics Robert E Mcculloch	3	3	B

Honors/Awards
The Chicago Journal of International Law, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
BUSN	31001	Leadership: Effectiveness and Development Robert Ward Vishny	0	0	P
BUSN	33001	Microeconomics Andrew McClellan	3	3	C+
BUSN	37000	Marketing Strategy Berkeley Dietvorst	3	3	A
BUSN	38003	Power and Influence in Organizations A. David Nussbaum	3	3	A-
LAWS	50311	U.S. Supreme Court: Theory and Practice Req Designation: Meets Writing Project Requirement Sarah Konsky Michael Scodro	3	3	179
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
BUSN	33112	Business in Historical Perspective Richard Hornbeck	3	3	A-
BUSN	38119	Designing a Good Life Nicholas Epley	3	3	A
LAWS	43280	Competitive Strategy Eric Budish	3	3	178
LAWS	81002	Strategies and Processes of Negotiation George Wu	3	3	179
LAWS	94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Date Issued: 06/10/2023

THE UNIVERSITY OF CHICAGO

Name: Natalia Angelina McLaren
Student ID: 12334928

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
BUSN	31403	Leadership Studio Harry L Davis Nancy Tennant	3	3	A
BUSN	38002	Managerial Decision Making Anuj Shah	3	3	A
LAWS	42603	Corporate and Entrepreneurial Finance Steven Neil Kaplan	3	3	177
LAWS	43248	Accounting and Financial Analysis Philip Berger	3	3	174
LAWS	94130	The Chicago Journal of International Law	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

End of University of Chicago Law School

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am pleased to recommend Natalia McLaren for a judicial clerkship. She brings boundless energy, a passion for the law, and a warm and joyful personality to everything she does. She is eager to take on challenges, and indeed after her 1L year she was accepted to the accelerated, 3-year JD/MBA program here at the University of Chicago. She has thrived in her coursework at the law school and at the Booth School of Business, and she is an active leader of student organizations. She will be a hard-working judicial clerk who will love working with you to get the law right.

I have known Natalia since the beginning of her 1L year, when she was a student in my Civil Procedure section. Natalia was one of the students I became acquainted with early in the quarter, and I have gotten to know better since. In class, she was engaged but would only ask questions occasionally. After class or in office hours, however, she would sometimes come with questions, seeking clarifications about the material or a deeper understanding of the points raised in class. I also had a chance to interact with her informally, at student lunches and events, and it was in these latter settings that I got a better sense of her personality.

And what a personality! If you are looking for soft-spoken or reserved, Natalia is not for you. But if you are looking for a clerk who is overflowing with positivity, full of energy, and always ready to seize the day, then Natalia may be that clerk. She is the kind of person who exudes optimism and loves to laugh.

She is serious about her studies, though, even if her demeanor is light-hearted. As I noted above, she was a highly engaged student in class. She did well on the exam and earned a 178 for the course (a “B+” in our peculiar grading system). This grade is representative of Natalia’s overall grades through her first two years of law school. Her average—right around 178—is indicative of solid and consistent performance, especially given the law school’s strict enforcement of a curve and a “B” median on all exams.

And her current studies are not limited to the law. As I’ve mentioned, she is a JD/MBA student, and thus a share of her coursework has been in cross-listed and MBA-only courses. Her performance in her business-school classes has been strong overall. (Her only weakness seems to be in courses with a more mathematical orientation. I suppose this shouldn’t be too surprising, given that, although she graduated magna cum laude from Dartmouth, she hasn’t taken a mathematics course since high school.) From my conversations with her, she is enjoying the business-school side of her studies, although her first and greatest passion is law.

Natalia is open-minded, has broad interests, and is always ready for a challenge. In addition to her ambitious dual degree program, she is very active in the life of the law school. She is on the editorial board of the Chicago Journal of International Law, holds leadership roles in several student organizations, and even plays intramural sports and has performed in the law school musical. (She loves her extracurriculars, but she makes no claims about her skills as an athlete or singer!) In college, her honors thesis for her English major was a creative writing project—a story closely based on the early life of her mother, who did not know who her true biological mother was until age six, shortly before she moved from Jamaica to the United States. She loved her studies abroad in college, and that experience led her to pursue opportunities in law that could generate opportunities for working abroad. Indeed, she will be spending part of this summer at Skadden Arps in London.

In sum, Natalia McLaren has compiled a solid record of achievement at arguably the most demanding law school in the country (and also at what is arguably the toughest MBA program, too). She has an animated, big personality that is full of optimism and warmth. She has broad interests and a love of the law. I am happy to recommend her for a clerkship, and I would be happy to answer any questions you have about her. Thank you for taking the time to consider her application.

Sincerely,

William H.J. Hubbard

William Hubbard - whubbard@uchicago.edu

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I'm writing to express my support for Natalia McLaren's application to clerk in your chambers. Natalia was my student in the required 1L Legislation and Statutory Interpretation course. There, she was always ready to speak up when I asked for volunteers and she proved consistently on top of difficult questions of doctrine. She was also prepared to discuss broader points about constitutional design and the tradeoffs between different judicial and democratic values in our class debates over methods of interpretation. Her final exam earned an A because it was lawyerly, imaginative, and well written.

Natalia is the type of person who creates community and builds institutions wherever she goes. While at the law school, she founded the Supreme Court and Appellate Society, a group that is already hosting meetings and inviting speakers, and is part of the life of the school. She is also one of the most charming people I've ever met. Natalia resists categorization as an affiliate of any clique or indeed, of any party, as an essential part of her personality is her ability to talk to and befriend anyone, anywhere. Budding good lawyers are easy to find at the top schools but Natalia special personal qualities set her apart. She's both magnetic and sincerely kind.

Thanks and all my best,
Farah Peterson

Farah Peterson - fpeterson@uchicago.edu - 773-702-9494

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

Natalia McLaren, who is a 2L at the Law School, has applied for a clerkship position in your chambers. I believe she would be a great law clerk, and I recommend her enthusiastically.

I had the opportunity to teach Natalia in a seminar course, U.S. Supreme Court: Theory and Practice, during the Fall Quarter of her 2L year of law school. I quickly was impressed with Natalia's excellent contributions to our class discussions. Her comments and questions were insightful and interesting. They regularly advanced the class discussion in a productive way.

Natalia did two major assignments for this seminar course: a mock Supreme Court brief and a mock Supreme Court oral argument. Students review opinions and filings from real cases, analyze the legal issues in the cases, develop the best arguments for their side, and demonstrate their written and oral advocacy skills. Natalia did impressive work on these projects. She earned a grade of 179 in the course – a strong grade on our Law School's strict grading curve.

Natalia's brief for the seminar was well-written, clear, and persuasive. The students drafted a brief in opposition to a petition for certiorari, which alleged a circuit split on a vicarious liability question. Natalia successfully dismantled the petition in her brief in opposition. She spotted and raised strong arguments for her side. She effectively explained why the circuits in fact are in alignment on the question presented. She also identified other important problems with petitioner's arguments.

Natalia similarly delivered a good oral argument for the seminar. The students argued Percoco v. United States, which was then pending before the Supreme Court. At issue in the case was whether a private citizen with influence over government decision-making could be convicted of "honest services" wire fraud. The case required the students to grapple with some tough concepts, and then to figure out how to address difficult hypotheticals. Natalia demonstrated a strong understanding of the facts, issues, and arguments in the case. She made thoughtful legal and policy arguments in support of her position. She did a good job handling tough questions.

I enjoyed having Natalia in class and getting to know her outside of class, too. She seems personable, engaging, and interesting. She strikes me as being equally at ease discussing difficult legal questions and talking about current events or pop culture. I think she would be great to have in chambers.

Natalia is exceptional in other ways, too. Her parents both immigrated to the United States from Jamaica before she was born. Natalia grew up in the Poconos, Pennsylvania. She was a successful athlete and musician growing up. Just in high school, for example, she explains that she made varsity in three sports, was the first chair violin, and made the most competitive singing group at her school. Natalia now is an avid creative writer, as well. She first discovered her love of creative writing in a course her freshman year of college. She explains that she ultimately went on to do her college senior thesis in Creative Writing – and that she earned high honors for her biographical fiction about her mother's early life. She seems to be an outstanding storyteller (in a good way).

I believe that Natalia would be a strong law clerk, and I am happy to have the opportunity to recommend her.

Sincerely,

Sarah M. Konsky
Director, Jenner & Block Supreme Court and Appellate Clinic
Associate Clinical Professor of Law

Sarah Konsky - konsky@uchicago.edu - 773-834-3190

NATALIA MCLAREN

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Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a memorandum about the likelihood of the U.S. District Court for the Northern District of Illinois finding that a billboard's message contained commercial speech under the First Amendment of the U.S. Constitution in a fictional case. I did not excerpt this piece for this writing sample. My professor and my school's writing coach provided feedback on the piece.

MEMORANDUM

To: Professor Shaffer

From: Natalia McLaren

Re: Winter Open Memo

Date: February 15, 2022

Question Presented

SpaceY erected billboards on Chicago's Interstate 55 featuring an image of a football player hitting Roy Kent in his final game playing on the Chicago Bears. The billboards include SpaceY's logo, and the text, "Check Your Blind Spot! You Should Care When Driving!" Kent wants to take legal action against SpaceY's billboards, seeking to have SpaceY take the billboards down. Under the First Amendment of the United States Constitution, did SpaceY's billboards constitute commercial speech?

Brief Answer

The court will likely find that SpaceY's billboards do not constitute commercial speech under the First Amendment. The billboard's speech likely does not propose an economic transaction, bolster specific products, act as an advertisement, or derive from an economic motivation, as the only speech potentially with a commercial nature is SpaceY's logo on the billboards. As the court would probably determine that the logo was inextricably intertwined with the billboard's public service reminder to stay alert and safe while driving, SpaceY's billboards will likely receive full protection under the First Amendment as noncommercial speech.

Facts

Roy Kent's career as a professional football player on the Chicago Bears ended when he took a hit to his blind side. Following his retirement, Kent worked for the Bears as an assistant

coach. While he coached, fans from opposing teams frequently taunted Kent about the career-ending play. Reporters often asked Kent about the taunts, and he always responded, "I don't care," even though the jeers secretly hurt him.

Kent helped coach the Bears to a victory at Super Bowl LVI. One day after the Bears' win, Eton Lusk's Green Bay, Wisconsin–based space company, SpaceY, erected billboards along Chicago's Interstate 55. The billboards contained an image of a football player sacking Kent in his final game before retirement, SpaceY's logo, and the text, "Check Your Blind Spot! You Should Care When Driving!" Lusk explained why SpaceY, his company based in the Bears' rival team's city, put up the billboards: running his electric car company, a company separate from SpaceY, taught him the importance of auto safety, and he wanted to share that message.

Roy Kent wants to take legal action in the U.S. District Court for the Northern District of Illinois against SpaceY for erecting billboards with his image.

Analysis

The First Amendment of the United States Constitution prohibits the government from restricting the freedom of speech. U.S. CONST. amend. I. While noncommercial speech receives full protection under the First Amendment, commercial speech receives less protection. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Although commercial speech receives lesser protections than fully protected First Amendment speech, commercial speech still retains some protection under the First Amendment. *Bigelow*, 421 U.S. at 826 (holding that while an advertisement about abortion availability for Virginia residents in New York constituted commercial speech, course must still weigh the commercial message at stake against "the public interest allegedly served by the regulation.").

Courts consider multiple factors to determine whether speech is commercial or noncommercial, including whether the speech contains an advertisement, references specific products, proposes transactions, stems from economic motivations, or whether commercial elements must intertwine with noncommercial elements to create a message to the public. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983); *Bd. of. Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Riley v. Nat'l Fed. Of the Blind of N.C.*, 487 U.S. 781, 794–95 (1988). Even if some elements of a message contain commercial speech, the inextricably intertwined doctrine considers whether commercial speech must intertwine with noncommercial speech to deliver a message. *See, e.g.*, *Riley*, 487 U.S. at 796. The precedent that shaped commercial speech doctrine derives from public-law cases, and has yet to clarify how the protection afforded to commercial speech applies to clashes between private rights. *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514–15 (7th Cir. 2014). However, this complexity goes beyond the scope of the question presented.

This memo first addresses whether SpaceY's billboards contain commercial speech that would receive lesser protections under the First Amendment, and then analyzes how the court may view the portions of SpaceY's speech that might have commercial elements in light of the inextricably intertwined doctrine. Both inquiries help determine the likelihood of whether the court will find that SpaceY's billboards constitute separable commercial speech that receives lower constitutional protection.

(1) SpaceY's billboards likely do not constitute commercial speech.

Commercial speech doctrine applies when speech "propose[s] an economic transaction," but that definition only presents a starting point, especially when speech may not be "characterized merely as proposals to engage in commercial transactions." *See Fox*, 492 U.S. at

482 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 761); *Bolger*, 463 U.S. at 66; s*ee also Jordan*, 743 F.3d at 516–17 ("[I]t's a mistake to assume that the boundaries of the commercial-speech category are marked exclusively by this 'core' definition."). The *Bolger* framework sets out other considerations, including whether: "(1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech." *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009) (citing *Bolger*, 463 U.S. at 66–67); *see also Jordan*, 743 F.3d 509, 517. However, no one factor may by itself place speech in the commercial category, but some combination of factors may suggest that the content constitutes commercial speech. *See Bolger,* 463 U.S. at 66–67; *see also Jordan*, 743 F.3d at 518–19. In addition, the *Bolger* framework provides a general inquiry—how narrowly or broadly a court may apply it depends on the facts presented to the court. *See Jordan*, 743 F.3d at 517.

When speech "contains both commercial and noncommercial elements," and stops short of clearly proposing a commercial transaction, courts use and modify the general *Bolger* framework to determine whether the messaging or imaging promotes brand loyalty or awareness. *See Jordan*, 743 F.3d at 518–19. In *Jordan*, the court first determined that while Jewel's grocery stores' page in *Sports Illustrated* did not explicitly propose a transaction for a specific product, the message still constituted an "advertisement" because "it promote[d] brand awareness or loyalty." *Id.* at 518. The court then broadened the *Bolger* framework prong relating to whether the speech referred to a specific product to include general brand and image advertising and incorporated that inquiry in determining whether the speech was also an advertisement with an economic motivation. *Id.* at 519–20. The court found that since Jewel included both its logo in the center of the magazine page and incorporated Jewel's slogan into its message congratulating Michael Jordan on his induction into the National Basketball Association's Hall of Fame,

Jewel's message burnished the specific "brand name" and "enhance[d] consumer goodwill." *Id.* In doing so, the court determined that Jewel's "specific product" was their brand name, and their economic motive was to burnish their brand "to enhance consumer goodwill." *Id.*

The court will likely find that SpaceY's billboards were not "plainly aimed at fostering goodwill" for SpaceY's brand. *See Jordan*, 743 F.3d at 518. The court in *Jordan* heavily focused its inquiry on how Jewel's logo appeared front and center on the magazine page and also that Jewel incorporated its motto into its message congratulating Jordan. *Id.* However, from the information provided, only SpaceY's logo appeared on the billboard, and its text, "Check Your Blind Spot! You Should Care When Driving!" merely incorporated Kent's repeated response to reporters, "I don't care." The message contained nothing about SpaceY's slogan, assuming it has one. Although it is unclear from the fact pattern if SpaceY's logo appears in large, center-facing font, the fact that its slogan does not appear on the billboard distinguishes it from *Jordan*. In addition, while Michael Jordan hailed from Chicago and had a loyal fanbase, and so congratulating Jordan might have bolstered goodwill for Jewel Food Stores, SpaceY makes fun of Kent, a beloved football-player-turned-coach, in Kent's team's city, just a day after the Bears' Super Bowl win. Instead of fostering goodwill for SpaceY's brand, the billboards almost seem to *diminish* SpaceY's brand in Chicago at the cost of making a joke that simultaneously reminds the public to stay safe and keep alert while driving. Although one may argue that "no press is bad press," and that SpaceY promotes its brand just through visibility alone, courts make it clear that no one factor makes speech commercial. *See Bolger,* 463 U.S. at 66–67; *see also Jordan*, 743 F.3d at 518–19.

(2) SpaceY's billboards likely contain inextricably intertwined commercial and noncommercial speech.

When speech must contain both commercial and noncommercial elements to convey a message, courts deem the speech inextricably intertwined, noncommercial, and thus protected by the full force of the First Amendment. *See, e.g.*, *Riley*, 487 U.S. at 796; *Fox*, 492 U.S. at 474; *Jordan*, 743 F.3d at 521. Conversely, when "no law of man or of nature" renders it impossible to separate the noncommercial and commercial aspects of speech, courts give the commercial speech a lower degree of protection. *See Fox*, 492 U.S. at 474.

The inextricably intertwined doctrine "applies only when it is legally or practically impossible for the speaker to separate out the commercial and noncommercial elements of his speech," but cannot be applied by "simply combining commercial and noncommercial elements in a single presentation." *Jordan*, 743 F.3d at 521. In *Jordan*, the court faced the question of whether Jewel's advertisement in Times' *Sports Illustrated* contained inextricably intertwined commercial and noncommercial elements. The court's finding in *Jordan* suggests that the commercial elements—including Jewel's center-facing logo and slogan to promote Jewel's brand name—could have been separated from the message congratulating Jordan's Hall of Fame initiation. *See Jordan*, 743 F.3d at 521–22 ("The commercial and noncommercial elements of Jewel's ad were not inextricably intertwined in the relevant sense. No law of man or nature compelled Jewel to combine commercial and noncommercial messages as it did here."). In addition, the court in *Fox* found that Tupperware companies did not need to solicit kitchenware to students in order to teach students home economics. As "no law of man or of nature makes it impossible to sell housewares without teaching home economics," or vice versa, the inextricably intertwined doctrine allowed the court to view the commercial messaging from a lower constitutional standard. *Fox*, 492 U.S. at 474. Conversely, the court in *Riley* found that even if North Carolina's mandated speech constituted commercial speech, since professional fundraisers

could not express otherwise fully-protected speech without including the mandated messaging, the speech was inextricably intertwined. 487 U.S. at 795–96. Thus, the court determined that the speech "as a whole" retained full protection under the First Amendment. *Id.*

Even if the U.S. District Court for the Northern District of Illinois found that SpaceY's billboards contained some form of commercial speech, the court will likely find the commercial messaging inextricably intertwined with the noncommercial speech regarding public safety. While the court in *Jordan* emphasized the commercial nature of Jewel's magazine page due to the incorporation of Jewel's slogan in Jordan's congratulatory message, as well as Jewel's large, center facing logo on the page, SpaceY only included its logo on the billboard with a message unrelated to its company. *Jordan*, 743 F.3d. at 519–20. One could imagine that to erect a billboard, the creator must at least include its name to signify who produced the message. If denoting the creator is necessary, then SpaceY would be unable to put up billboards with noncommercial messaging related to public safety without incorporating the possible commercial component of the company's name. For this reason, SpaceY's logo would likely be deemed inextricably intertwined with the billboard's message to stay alert while driving. Thus, it is likely that SpaceY's billboards would receive full protection under the First Amendment.

Conclusion

The Northern District of Illinois will likely conclude that SpaceY's billboards do not constitute commercial speech. SpaceY's billboards include an image of Kent, a public safety message tied with a jibe to the famous football-player-turned-coach, and SpaceY's logo. Although the billboards contain a form of speech possibly considered commercial—the logo—the lack of other branding and the failure to include a slogan for SpaceY may dilute the logo's

commercial significance. In addition, even if the court finds that the logo inherently possesses a commercial nature, the ability to erect a billboard with noncommercial messaging probably requires the creator to tie its name to the content. For this reason, the noncommercial elements are likely inseparable from the logo, and the court would deem the billboards inextricably intertwined noncommercial speech. Thus, the court will likely determine that SpaceY's billboards do not constitute commercial speech, and therefore will receive full constitutional protection under the First Amendment.

Applicant Details

First Name	**Evan**
Middle Initial	**M**
Last Name	**Meisler**
Citizenship Status	**U. S. Citizen**
Email Address	**evan.m.meisler@gmail.com**
Address	**Address** **Street** **30 w 63rd st., Apt 19A** **City** **New York** **State/Territory** **New York** **Zip** **10023** **Country** **United States**
Contact Phone Number	**2162154979**

Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2015**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Orison S. Marden Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Holmes, Stephen
stephen.holmes@nyu.edu
212-998-6357

Murphy, Liam
liam.murphy@nyu.edu
212-998-6160

Rascoff, Samuel
samuel.rascoff@nyu.edu
(212) 992-8907

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Evan M. Meisler
30 W 63rd St., Apt #19A
New York, NY 10023
(216) 215-4979
Evan.Meisler@law.nyu.edu

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year student at New York University School of Law, and I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am especially eager to clerk for you because I admire your extensive judicial career as a judge of both the Vermont Supreme Court and Second Circuit. I also have close friends and family in Vermont and throughout New England, and would be thrilled to begin my legal career near our shared alma mater as a clerk in your chambers.

I wish to clerk for two primary reasons. First, I am committed to public service, as illustrated by my non-profit volunteer experience and upcoming State Department internship. Clerking would be both a terrific chance to serve the public and an ideal next step toward a career in government practice. Second, I genuinely enjoy learning, researching, and writing about diverse areas of the law, which led me to serve as an Articles Editor for the *New York University Law Review*, compete in the Marden Moot Court Competition, and pursue teaching and research assistantships. Clerking for you would be an unparalleled opportunity to gain exposure to a wide breadth of legal doctrine.

Last autumn, I was an intern for the Honorable Lewis J. Liman of the United States District Court for the Southern District of New York. I believe that this role, combined with my six years of professional experience before law school, has prepared me to succeed as a clerk in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. Also enclosed are letters of recommendation from Professors Liam Murphy, Samuel Rascoff, and Stephen Holmes. Judge Liman and Professor Samuel Issacharoff, my Complex Litigation instructor, have also offered to serve as references. They may be reached at (212) 805-0226 and (212) 998-6580, respectively.

If there is any additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Evan Meisler

Evan M. Meisler

EVAN M. MEISLER
30 W 63rd St., Apt #19A, New York, NY 10023 | (216) 215-4979 | Evan.Meisler@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.79
Honors: Florence Allen Scholar (top 10% of class based on GPA after first four semesters)
NYU Center for Cybersecurity Cyber Scholar
White & Case / Orison Marden International Public Interest Fellow
Activities: New York University Law Review, Articles Editor & Quantitative Editor
Teaching Assistant to Professors Liam Murphy (Contracts) & Samuel Rascoff (Intelligence Law)
Research Assistant to Professors Samuel Rascoff & Stephen Holmes
Marden Moot Court Competition, Semi-Finalist
Leadership: National Security Law Society, Co-President
International Arbitration Association, Co-President & Treasurer
International Law Society, Board Member

DARTMOUTH COLLEGE, Hanover, NH
Bachelor of Arts in Government, June 2015
Honors: Citation of Meritorious Academic Performance for Research on Private Military Contractors
Activities: Rowing, Three-Time Varsity Letterman, Intercollegiate Rowing Association All-Academic Award

EXPERIENCE

STATE DEPARTMENT OFFICE OF THE LEGAL ADVISER, Washington, D.C.
Incoming Summer Legal Intern, July 2023-August 2023

COVINGTON & BURLING, Washington, D.C.
Summer Associate, May 2023-July 2023
Participate in litigation and regulatory matters. Draft memos for appellate, consumer protection, and antitrust practices.

CHAMBERS OF JUDGE LEWIS J. LIMAN, New York, NY
Judicial Intern, U.S. District Court for the Southern District of New York, August 2022-December 2022
Conducted research and drafted opinions for Title VII, FOIA, false advertising, and cross-border contract disputes.

INTERNATIONAL LAW COMMISSION, Geneva, Switzerland
International Law & Human Rights Fellow, May 2022-August 2022
Performed academic research and prepared remarks for Commissioner Hassouna on emergent topics in international law. Authored paper on international climate law shared at the 2022 UN Climate Change Conference.

EVERQUOTE, Cambridge, MA
Director of Strategy & Business Development, July 2018-September 2021
Managed client relationships generating over $30 million in annual revenue. Conducted rigorous qualitative and quantitative analysis to evaluate strategic business opportunities. Managed two direct reports. As co-chair of community service committee, initiated sponsorship of homeless shelter for people suffering from opioid addiction.

INVESTOR GROUP SERVICES, Boston, MA
Private Equity Consultant, August 2015-June 2018
Delivered 40+ due diligence and portfolio strategy studies for private equity clients. Led case teams consisting of 10+ researchers and associate consultants. Produced timely, high-quality deliverables and built strong client relationships.

VOLUNTEER EXPERIENCE

NEIGHBORSHARE, Cambridge, MA; Head of Donor Growth & Engagement; June 2020-September 2021
Led business development, partnerships, and user research operations for peer-to-peer-giving non-profit startup.

BRIGHAM AND WOMEN'S HOSPITAL, Boston, MA; Volunteer Musician; November 2020-September 2021
Performed music over Zoom for patients in Boston-area hospitals during COVID-19 pandemic to boost morale.

ADDITIONAL INFORMATION

Secret-level security clearance. Proficient in French. President of acapella group Substantial Performance and guitarist. Rowed competitively in Henley Royal Regatta, Heineken Roeivierkamp, and won gold medal at Head of the Charles.

Name: **Evan M Meisler**
Print Date: **06/07/2023**
Student ID: **N11232337**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Elizabeth J Chen			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Rachel E Barkow			
Torts	LAW-LW 11275	4.0	B+
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Samuel Issacharoff			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Benedict W Kingsbury			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Elizabeth J Chen			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Emma M Kaufman			
International Law	LAW-LW 11577	4.0	A-
Instructor: Jose E Alvarez			
Contracts	LAW-LW 11672	4.0	A
Instructor: Liam B Murphy			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Law and Society in China Seminar	LAW-LW 10871	2.0	A
Instructor: Ira Belkin			
Katherine A Wilhelm			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Liam B Murphy			
Constitutional Law	LAW-LW 11702	4.0	A
Instructor: Kenji Yoshino			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande			
Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande			
Alison J Nathan			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A+
Instructor: Samuel Issacharoff			
Arthur R Miller			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Evidence	LAW-LW 11607	4.0	A+
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Samuel J Rascoff			
Colloquium on Law and Security	LAW-LW 11698	2.0	A
Instructor: Stephen Holmes			
David M Golove			
Rachel Anne Goldbrenner			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Stephen Holmes			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	58.0	58.0

Allen Scholar-top 10% of students in the class after four semesters
Staff Editor - Law Review 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law

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New York, New York 10012-1099
Telephone: (212) 998-6357
E-mail: stephen.holmes@nyu.edu

Stephen Holmes
Walter E. Meyer Professor of Law

June 5, 2023

Dear Judge:

I am extremely pleased to endorse Evan Meisler's candidacy for a clerkship. I have no hesitation in saying that Meisler is one of the most gifted students I have had the pleasure of knowing in more than forty years of teaching. He is a truly exceptional young legal scholar and would without any doubt be a superb clerk at your court. His final paper in my Colloquium on Law and National Security, a brilliant exposition of Turkiye Halk Bankasi A.S. v. United States, was by far the most penetrating and original paper of the semester.

He also worked for me this spring as a research assistant on the consequences for international law and politics of the Russian invasion of Ukraine. In this capacity he wrote an outstanding series of papers on the reactions to the war in India, Brazil and Turkey. I am not uninformed about these topics but I have to admit that I learned an immense amount from these marvelously written and tightly argued papers. Having benefited from his appetite for hard-work, his curiosity and his ability to summarize crisply difficult material, I cannot speak too highly of his talents for research and writing.

I have no doubt that he would be an extraordinary clerk. I recommend him to you with unreserved enthusiasm.

Cordially,

Stephen Holmes
Walter E. Meyer Professor of Law

New York University
A private university in the public service

School of Law

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New York, New York 10012-1099
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Facsimile: (212) 995-4894
Email: liam.murphy@nyu.edu

Liam Murphy
Herbert Peterfreund Professor of Law
& Professor of Philosophy

June 5, 2023

Dear Judge

I write to recommend EVAN MEISLER to you for a clerkship in your chambers. It is a special pleasure to do so. Evan was in my contracts class in the spring of 2022 and served as my TA for contracts last fall. I know him well.

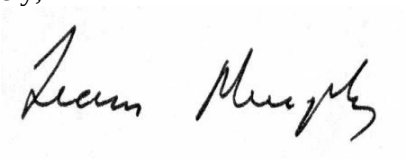
I have rarely been in a position to write for someone who is so clearly already fully prepared for a successful legal career. He is exceptionally mature for a second-year law student. No doubt this is in part because of his six years in the private sector between college and law school. But he nonetheless came to law school as an eager student, and since his second semester has been performing at the very top of the class. His exam for me was excellent, and he was always thoughtful and constructive in class discussion. He was one of my very first choices for a TA. Since then, Evan has gone from strength to strength. He must be especially proud, and rightly so, of the A+ he was just awarded in Professors Samuel Issacharoff and Arthur Miller's complex litigation class, one of the most demanding and competitive classes we offer.

Evan was an excellent teaching assistant. What I have my TAs do is prepare sample problems for discussion with a section of the class. We discuss the problems as a group before the TAs meet with the students. The problems Evan drafted showed creativity and a grasp of contract doctrine as strong as I have seen in any student. But even more important, perhaps, is that he was extremely constructive in helping the other TAs work out kinks in problems they had drafted. He has an unprepossessing, calm manner that allows him to stop colleagues going astray without them feeling at all criticized. Evan is also, as his writing sample shows, an excellent writer. In all, his intelligence, legal acumen, writing skills, and excellent collaborate ability, make him extremely well qualified for a clerkship.

But with Evan there is more. He spent six years in the financial sector. He is now considering a mix of private practice and government service in the defense/intelligence sector. He would also like to teach at some point, perhaps as an adjunct. What I see is a person who knows very well the kind of work he wants to do, even if the exact mix remains to be worked out (and will no doubt turn in part on the opportunities that come his way). That, and a person who is one hundred percent prepared to excel on his chosen path. Evan is not, in other words, merely another very bright young law student with lots of promise. He is already operating with a level of seriousness of purpose and maturity that one would normally expect of an attorney several years on from their clerkships. I believe that Evan will be an unusually valuable clerk.

Let me end by saying that with all his achievements, Evan somehow manages to live a full life, one that includes sports and music, and helping others. He is also charming and easy-going, fully comfortable in his skin. I recommend him very highly and without reservation. Please let me know if I can be of any further assistance.

Sincerely,



New York University
A private university in the public service

School of Law

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Samuel J. Rascoff
Professor of Law

June 8, 2023

Dear Judge:

I am delighted to recommend Evan Meisler to you for the position of law clerk. Although Evan has never been my student, I got to know him well as my research assistant this past summer and again as my teaching assistant this past semester. Based on our many hours of interaction I can safely say that Evan would make a wonderful clerk. He is extremely smart, highly professional, nimble with technology, and fun to be around.

Last summer I reached out to Evan (on the strength of a glowing recommendation from a colleague) for help in planning a seminar in the legal architecture of espionage and all matters intelligence. He proved very effective at researching the state of the art in the field and collaborated with me over months in generating a compelling syllabus. On the strength of his work as an RA I asked Evan to serve as a TA for the seminar. He excelled at that, too. Whether it was making a last-minute tweak to the syllabus or facilitating clear communication with the seminar members or weighing in thoughtfully about the policy issues in play, Evan proved to be an invaluable TA.

Evan's transcript attests to the fact that his success as an RA and TA was hardly a fluke. He has, of late, developed the habit of earning A+s in very difficult doctrinal classes. On top of that he serves on Law Review and is involved in other worthy extracurricular pursuits.

Thinking back on my own clerkship experiences, Evan is precisely the sort of clerk who will wear well in chambers. He will do excellent work, do it on time, and make it all happen with a sense of joyous dedication.

In short, I say without hesitation: Hire Evan!

Sincerely,

Samuel J, Rascoff

The following writing sample is my brief for the semi-final round of NYU's Marden Moot Court Competition. This brief is entirely my own work and has not been edited by anybody else. Please note that the competition organizers provided no citation for the imaginary district and circuit court cases that formed the record for this competition. Therefore, all citations to those imaginary cases appear as citations to the record. In actual practice, I would conform to Bluebook convention by citing to all cases by name, identifying the reporter, and providing pinpoint citations as appropriate.

No. 24-3690

IN THE
Supreme Court of the
United States

UNITED STATES OF AMERICA
Petitioner,

v.

PAUL YOUNG,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR THE UNITED STATES

EVAN M. MEISLER
Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether it was error for the Fourteenth Circuit to override the express terms of the Federal Tort Claims Act by applying the "prison mailbox rule," a legal fiction which deems certain notices "filed" when they are handed to a prison official, to an untimely administrative claim.

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FEDERAL RULES

MISCELLANEOUS

STATEMENT OF FACTS

Paul Young ("Young" or "Respondent") is an inmate at Fairview Correctional Facility, a federal penitentiary in the District of Eagle State. R. at 3. Young alleges that on February 14, 2017, a group of prison guards and fellow inmates entered his cell and physically abused him. R. at 3, 13. He further alleges that he was denied adequate medical care by the prison's medical ward personnel. R. at 4, 13. Young did not pursue legal redress immediately. R. at 4.

Young eventually decided to file an administrative claim under the Federal Tort Claims Act ("FTCA"). R. at 13. The FTCA imposes a two-year statute of limitations for filing such a claim. 28 U.S.C. § 2401(b). Accordingly, Young was required to present his Form SF-95 administrative notice to the Bureau of Prisons ("BOP") by February 14, 2019. R. at 13.

Approximately one month before the end of the limitations period, Young dismissed his previous attorney and retained new counsel. R. at 4, 13. Young filled out an SF-95, allegedly without the assistance of his new attorney. R. at 4, 13. He claims to have eschewed assistance of counsel because he was anxious about the approaching filing deadline, and feared that it would take too long for his new attorney to become fully acquainted with his case. R. at 13.

In a sworn and signed affidavit, Young claims that on February 8, 2019, he gave his completed SF-95 to a correctional officer charged with sending the form as First-Class Mail via the prison mail system. R. at 4, 13. The Postal Service attempted to deliver the claim to BOP's regional office on February 14, 2019, the last day of the limitations period. R. at 4. This delivery attempt failed because it took place after the close of business hours. R. at 4, 17. The form was delivered and stamped on February 15, 2019, the day after the limitations period lapsed. R. at 4.

After the BOP denied his claim as untimely, Young sued in the District Court for the District of Eagle State. R. at 4. The United States ("Government" or "Petitioner") moved for

summary judgment, arguing that Young's claim was barred by the FTCA's statute of limitations. R. at 3. Young argued that the "prison mailbox rule," according to which some claims by inmates are deemed "filed" when they are given to prison authorities, rendered his complaint timely. R. at 5. The district court granted the Government's motion, holding that the prison mailbox rule does not apply to administrative claims with limitation periods defined by statute or regulation. R. at 3. The Court of Appeals for the Fourteenth Circuit reversed and remanded, holding that the prison mailbox rule extends to administrative claims made under the FTCA. R. at 12, 13. The Government appealed, and the Supreme Court granted certiorari. R. at 19.

SUMMARY OF THE ARGUMENT

Plaintiff's FTCA claim was received by the Bureau of Prisons after the relevant limitations period had run. The "prison mailbox rule" does not apply in the face of an explicit statutory and regulatory mandate such as the FTCA's. Accordingly, Young's claim is not timely filed, and the United States' motion for summary judgment should be granted.

The FTCA is a limited waiver of sovereign immunity. Its statute of limitations, as defined by statute and regulation, is a condition of that waiver. Because sovereign immunity can be waived only explicitly, by consent, and at the absolute discretion of Congress, the FTCA's statute of limitations must be construed narrowly and favorably to the Government.

The FTCA's text, and the regulations implementing it, require a claim to be received by the relevant agency within two years of its accrual. A faithful textual interpretation of "receive" would require that Young's claim be placed physically in the Bureau of Prisons' possession within the limitations period. Merely mailing the claim and/or attempting, but failing, to deliver the claim during this period do not satisfy this requirement. The lack of any textual exception for inmates, despite amendments that single out inmates in other ways, signifies that inmates are not to be

afforded special leniency under the FTCA. Congress's policy considerations undergirding the FTCA's statute of limitations, as well as the rationales for statutes of limitations in general, buttress the conclusion that physical receipt of a claim within the limitations period is required.

Taken together, the two most relevant Supreme Court cases, Houston v. Lack, 487 U.S. 266 (1988), and Fex v. Michigan, 507 U.S. 43 (1993), stand for the proposition that a statute of limitations' plain text is presumptively controlling, even for inmates such as Young. The court should only entertain policy consideration, which may or may not justify leniency, only in the case of statutory and regulatory silence or ambiguity. Virtually all circuit courts of appeals have adopted this interpretation. The few that have held otherwise rely on flawed readings of Houston and Fex. The Fourteenth Circuit's expansive construal of the "prison mailbox rule" places Houston in irreconcilable and unnecessary tension with Fex, and should therefore be rejected.

ARGUMENT

I. SUMMARY JUDGMENT IS SUBJECT TO *DE NOVO* REVIEW ON APPEAL.

The decision to grant or deny a motion for summary judgment is a question of law, which is reviewed *de novo*. Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review . . . questions of law . . . [are] reviewable *de novo* . . . ."); accord 11 James W. Moore et al., Moore's Federal Practice § 56.131 (3d ed. 2022). A party is entitled to summary judgment if there is "no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and if after drawing all factual inferences "in the light most favorable to the party opposing the motion," United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), the moving party is entitled to judgment as a matter of law. See also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (stating that summary judgment is appropriate where "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

II. AS A WAIVER OF SOVEREIGN IMMUNITY, THE FTCA DEMANDS A NARROW READING FAVORABLE TO THE GOVERNMENT.

The Federal Tort Claims Act is a waiver of sovereign immunity, a principle which forecloses legal action against the federal government for the tortious acts of its employees unless it consents to liability by statute. See Price v. United States, 174 U.S 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability . . . cannot be extended beyond the plain language of the statute authorizing it."); Jeffrey Axelrad, Federal Tort Claims Act Administrative Claims: Better than Third-Party ADR for Resolving Federal Tort Claims, 52 Admin. L. Rev. 1331, 1332 (2000) ("Until the Federal Tort Claims Act was enacted in 1946, no general remedy existed for torts committed by federal agency employees."). Since waivers of sovereign immunity are acts of legislative grace, the terms and conditions of any such waiver are entirely within Congress's discretion. See Schillinger v. United States, 155 U.S. 163, 166 (1894) (noting that "Congress has an absolute discretion to specify the cases and contingencies" in which the government may be held liable).

The terms of any sovereign immunity waiver must be construed narrowly. See Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 94 (1990) (requiring that "condition[s] to the waiver of sovereign immunity . . . must be strictly construed"); United States v. Mitchell, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting United States v. King, 395 U.S. 1, 4 (1969)). Absent a clear statutory indication to the contrary, disputes as to sovereign immunity should be resolved in favor of the Government. See Lane v. Pena, 518 U.S. 187, 195 (1996) (noting the Court's "established practice of construing waivers of sovereign immunity narrowly in favor of the sovereign"). The Court has specifically applied this pro-Government "rule of construction," United States v. Nordic Vill. Inc., 503 U.S. 30, 34 (1992), to the FTCA's statute of limitations. See United States v. Kubrick, 444

U.S. 111, 117 (1979) (describing the FTCA's statute of limitations as a "condition of [the] waiver" which the Court should not "extend . . . beyond that which Congress intended").

The foregoing considerations demand that the Court only adopt Respondent's lenient construal of the FTCA and relevant precedent if the statutory text and case law unequivocally compel their preferred reading. The following sections demonstrates that this is not the case.

III. TREATING CLAIMS RECEIVED AFTER EXPIRATION OF THE LIMITATIONS PERIOD AS TIMELY CONTRADICTS THE FTCA'S TEXT AND PURPOSE.

Nobody disputes that Young's claim was not successfully delivered to BOP during the limitations period. R. at 4, 13. This section draws on the FTCA's text and purpose to refute the argument that Young's claim was "received," for limitations purposes, at some earlier juncture, such as when it was given to prison authorities, mailed, or when the failed delivery took place.

A. The FTCA's Plain Text Requires Timely Physical Receipt of Claims by the BOP.

The FTCA requires that an "action shall not be instituted upon a claim against the United States" until the claimant has exhausted his administrative remedies by first "present[ing] the claim to the appropriate Federal agency . . . ." 28 U.S.C. § 2675(a); see McNeil v. United States, 508 U.S. 106, 107 (1993) (stating that the presentment requirement is "unambiguous" from the text of the FTCA). Presentment must take place "within two years after such claim accrues," and a claim is "forever barred" for failure to adhere to this timeline. 28 U.S.C. § 2401(b).

Congress authorized the Attorney General to issue regulations defining the conditions of presentment and the statute of limitations. 28 U.S.C. § 2672. A claim is considered "presented" when "a Federal agency *receives* from a claimant . . . an executed Standard Form 95 or other written notification of an incident . . . ." 28 C.F.R. § 14.2(a) (emphasis added). The relevant agency is the one "whose activities gave rise to the claim," id., in this case the Bureau of Prisons.

Agencies are further enabled to "issue regulations and establish procedures" governing receipt of claims. 28 C.F.R. § 14.11. The Bureau of Prisons requires that claimants "either mail or deliver the claim to the regional office in the region where the claim occurred." 28 C.F.R. § 543.31(c).

A claim is "presented" when it is "received" by the BOP's regional office. 28 C.F.R. § 14.2(a); 28 C.F.R. § 543.31(c). "Receive" means to "come into possession of or get from some outside source." Receive, Black's Law Dictionary (11th ed. 2019); see also Receive, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/receive (last visited Mar. 10, 2023) (defining "receive" as "to come into possession of"). The notion that a claim could be considered "presented" or "received" when handed to a local prison official is incompatible with the FTCA's text, because such a claim clearly has not come into the possession of BOP's regional office. Nor can a claim be considered "received" when it is mailed, because BOP is not in possession of claims still in transit. And even if, counterfactually, "receive" were ambiguous, the Department of Justice's interpretation of DOJ and BOP regulations is, at a minimum, supported by valid reasoning and thus deserving of respect. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

This understanding of the receipt requirement is reinforced by intratextual analysis. Other deadlines in the FTCA refer to the time of "mailing," indicating that if Congress meant for mailing to fulfill the presentment requirement, it would have written the statute to say so. See, e.g., 28 U.S.C. § 2401(b) (requiring tort claims to be initiated within six months after the agency mails notice of final denial of an administrative claim); see also Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) (noting the "general principle of statutory construction" that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act,'" it is presumed to be done intentionally) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); accord. Henry J. Friendly, Benchmarks 224 (Univ. Chi. Press 1967).

The plain text also forecloses the argument that the failed attempt to deliver Young's claim on February 14 constitutes presentment, because this attempt did not transfer possession of his claim to the BOP. Federal courts have held that failed delivery is not presentment. See, e.g., Sacks v. U.S. Dep't of Health & Hum. Servs., No. 16-cv-05505-MEJ, 2017 WL 2472952, at *3 (N.D. Cal. June 8, 2017) (holding that failed delivery of an FTCA claim on a non-business day did not establish presentment). Requiring successful delivery is consistent with the judicial construction of other statutes of limitations as well. See, e.g., In re World Imports, 862 F.3d 338, 241–42 (3d Cir. 2017) (holding that, according to dictionary definitions and UCC interpretation, goods are "received" only when the debtor takes physical possession of them); Group Italglass U.S.A., Inc. v. United States, 839 F. Supp. 868, 870 (Ct. Int'l Trade 1993) (finding a duties protest untimely after plaintiff attempted to deliver it in-person and by fax after business hours on the final day of the limitations period); cf. Turner v. City of Newport, 887 F. Supp. 149, 150 (E.D. Ky. 1995) (accepting an after-hours court filing on the last day of a limitations period because it was deposited on the correct date and the courts are "always open" for filing) (citing Fed. R. Civ. P. 77).

Lastly, the absence of any textual exception for inmate claims speaks for itself. This absence is especially instructive because other FTCA sections were amended with inmate-specific language in 1995, shortly after the Court declined to apply the prison mailbox rule in Fex, 507 U.S. at 52. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 806, 110 Stat. 1231-66, 1321-75 (1996) (amending FTCA to prohibit incarcerated felons from suing the government for mental suffering alone). If Congress meant to overrule Fex by creating a rule of leniency for inmate filings, it would have done so. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) (noting that Congress's decision not to overturn the judicial interpretation of a statute that it has chosen to amend suggests "legislative recognition that the judicial construction is the correct one").

"[F]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson v. Garcia, 471 U.S. 261, 266 (1985) (quoting Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). In addition to waiving sovereign immunity, the FTCA governs "a vast multitude of claims" which "impose[] some burden on the judicial system" whenever the statutorily mandated procedures are not obeyed. McNeil v. United States, 508 U.S. at 112. "The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command" which, in turn, calls for "the most natural reading of the statute." Id. The waiver of sovereign immunity and the interest in efficient and uniform administration of the law strongly support giving "receive" its ordinary meaning, rather than endorsing Respondent's proposed concept of constructive receipt.

Moreover, applying an expansive definition of "receipt" to the FTCA, wherein Congress and the Executive have promulgated unambiguous language calling for the timely physical receipt of a claim, is tantamount to declaring that the political branches shall not have the last word in crafting statutes of limitations. This message would be inconsistent with the Court's holding that statutes of limitations are "subject to a relatively large degree of legislative control," Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945), especially in the highly discretionary context of a waiver of sovereign immunity. See Schillinger v. United States, 155 U.S. at 166.

B. Requiring Timely Physical Receipt of Claims Furthers the FTCA's Policy Goals.

The FTCA's legislative history and animating policy considerations provide further support for the requirement of actual physical receipt of a claim within two years of its accrual. Congress amended the FTCA in 1966 to include a presentment requirement so that agencies could quickly identify and settle meritorious claims against it, thereby averting pointless lawsuits. See S. Rep. No. 1327, at 4 (1966). The resulting efficiencies would "benefit private litigants, but

would also be beneficial to the courts, the agencies, and the Department of Justice itself." Id. at 2. Congress's explicit concern for these stakeholders mirrors the justifications for statutes of limitations in general: repose, accuracy, and discouraging procrastination. These policy interests are best served by requiring the timely physical, rather than constructive, receipt of claims.

First, statutes of limitations benefit *defendants* by supplying a guarantee of repose. See Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind . . . ."); Wilson v. Garcia, 471 U.S. at 271 ("[E]ven wrongdoers are entitled to assume that their sins may be forgotten."). They also protect defendants from the aggravated time, expense, and risk of error associated with defending stale claims "in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. at 117. They protect defendants not only from lackadaisical plaintiffs, but also from fraudsters seeking to "assert[] rights after the lapse of time ha[s] destroyed or impaired the evidence which would show that such rights never existed . . . ." Bailey v. Glover, 88 U.S. 342, 349 (1874). An agency cannot and will not begin the important process of preserving relevant evidence, or relinquish its legitimate expectation of repose, unless and until a claim has been physically delivered into its possession.

Second, statutes of limitations serve *the judiciary* by extinguishing claims that would require the onerous investigation of distant historical facts. See, e.g., Resolution Tr. Corp. v. Farmer, 865 F. Supp. 1143, 1152 (E.D. Pa. 1994) (stating that statutes of limitations are justified by considerations of "judicial economy"); Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (describing statutes of limitations as "instruments of public policy and of court management"). They also bolster social efficiency by enabling parties to order their affairs

without fear of liability for old transactions reemerging. See Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950) ("[T]he public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse."). Agencies, courts, and private entities can plan and allocate resources more efficiently knowing that incidents whose statutes of limitations have run will not resurface by surprise due to late-arriving mail.

Finally, statutes of limitations serve *plaintiffs* by encouraging action while their claims are fresh. Crown v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights . . . ."). Spurring plaintiffs to act protects them from jurors who may be inclined to penalize perceived procrastinators. See Riddlesbarger v. Hartford, 74 U.S. 386, 390 (1868) (noting that statutes of limitations exist because a valid claim is "not usually allowed to remain neglected," so the passage of time creates "a presumption against its original validity"); Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that statutes of limitations are intended to "stimulate to activity and punish negligence"). Leniently applying the FTCA's statute of limitations would thus enable plaintiffs to undermine their own interests by sitting on their hands, thereby permitting evidence to decay and inviting a jury's prejudice.

It would be unavailing for Young to claim that the FTCA's requirements are arbitrary, unfair to inmates, or that his failure to adhere to them is inconsequential and excusable. Statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." Chase Sec. Corp. v. Donaldson, 325 U.S. at 314 . Statutes of limitations represent a legislative judgment as to when "the need for repose and avoiding stale claims outweighs the interests in enforcing the claim." Katharine F. Nelson, The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default, 72 Neb. L. Rev. 454, 462 (1993). Congress's choice to "cut off rights, justifiable or not . . . must

be strictly adhered to by the judiciary," and any "remedies for resulting inequities are to be provided by Congress, not the courts." Kavanagh v. Noble, 332 U.S. 535, 539 (1947). Applying the prison mailbox rule to the FTCA, where Congress has spoken clearly as to the length and terms of the limitations period, would subvert the legislative intent and thwart the policy considerations animating both the FTCA in particular and statutes of limitations in general.

IV. THE PRISON MAILBOX RULE IS INAPPLICABLE TO YOUNG'S CLAIM BECAUSE THE FTCA'S FILING REQUIREMENTS ARE UNAMBIGUOUS.

A. Fex v. Michigan and Houston v. Lack Require Inmates to Obey Unambiguous Statutory and Regulatory Filing Requirements.

The district court and the Fourteenth Circuit relied principally on Houston v. Lack, 487 U.S. 266 (1988), and Fex v. Michigan, 507 U.S. 43 (1993) to justify their decisions. R. at 5, 14–15. In Houston, the Court adopted the prison mailbox rule for unrepresented inmates' notices of appeal, holding that such a notice is "filed" for purposes of the Federal Rules of Civil Procedure when it is handed to prison authorities for mailing. Houston, 487 U.S. at 270. In Fex, the Court declined to apply the prison mailbox rule to an inmate's request for final disposition of charges pursuant to the Interstate Agreement on Detainers ("IAD"). Fex, 507 U.S. at 52. The Court reasoned that the IAD's statute of limitations, which requires trial within 180 days after the inmate "shall have caused to be delivered" his request, starts to run on the date of actual receipt. Id.

Contrary to the Fourteenth Circuit's interpretation, Houston did not hold that the prison mailbox rule applies to all filings by inmates regardless of the statutory or regulatory scheme. R. at 14. Rather, the Houston Court implicitly accepted that the filing requirements were controlling, but held that the statute and rule furnishing these requirements were ambiguous:

> Respondent stresses that a petition for habeas corpus is . . . subject to the statutory deadline set out in 28 U.S.C. § 2107. But . . . [t]he statute . . . does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed . . . and nothing in the statute suggests that . . . it would be inappropriate to

> conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding . . . .

Houston, 487 U.S. at 272. The Court similarly emphasized the importance of statutory ambiguity in its discussion of the Federal Rules of Appellate Procedure's filing requirements:

> The question is . . . whether the moment of "filing" occurs when the notice is delivered to the prison authorities or at some later juncture in its processing. The Rules are not dispositive on this point, for neither Rule sets forth criteria for determining the moment at which the "filing" has occurred.

Id. at 273. If the Court meant to hold that inmates should categorically be treated leniently with respect to filing deadlines, it would have said so, and need not have engaged in statutory interpretation, which the Fourteenth Circuit declined to do. R. at 15. Properly read, Houston does not cast doubt on the idea that clearly defined statutory and regulatory filing deadlines, such as the FTCA's, are binding on inmates. Only after first exhausting its analysis of the statute and finding it ambiguous did the Court turn to "policy grounds" to justify leniency. Id. at 275.

The Fex Court rejected the prison mailbox rule due partly to "indications in the text," only resorting to policy considerations, as in Houston, because "the text alone [was] indeterminate." Fex, 507 U.S. at 52. Fex thus provides two lessons. First, Houston's prison mailbox rule does not apply automatically to all claims by inmates; if it did, Fex necessarily would have been come out differently. Second, sympathy for incarcerated inmates' special circumstances cannot overcome a textually unambiguous filing requirement prescribed by statute. Fex, 507 U.S. at 52 (declaring that policy arguments about "fairness" are "more appropriately addressed to . . . legislatures," and rejecting readings of the IAD of which the text "is simply not susceptible"). Even the Fex dissent focused on the statutory text, briefly mentioning Houston only to recall its policy considerations. See id. at 58. The dissenters restated Houston's holding narrowly as "a *pro se* prisoner's *notice of appeal* is 'filed' at the moment it is conveyed to prison authorities . . . ." Id. (Blackmun, J.,

dissenting) (emphasis added), which is far narrower than the Fourteenth Circuit's holding. R. at 14. No Justices, either in Houston or Fex, espoused the Fourteenth Circuit's extreme stance.

Unlike the statutes and rules at issue in Houston and Fex, the FTCA's statutory and regulatory scheme is unambiguous. As discussed in Part III.A., the FTCA's plain text requires that the BOP's regional office must physically receive a would-be plaintiff's claim within two years of accrual. Thus, Houston and Fex dictate that the prison mailbox rule does not apply here.

The Fourteenth Circuit found Fex to be inapplicable because its animating policy concern, namely the fear of precluding meritorious prosecutions, Fex, 507 U.S. at 50, is absent in this case. R. at 14. Accordingly, the court held that fairness and the balance of the parties' interests favor an expansive application of the prison mailbox rule. R. at 15. This reasoning is erroneous for three reasons. First, as just discussed, neither Houston nor Fex suggests that policy considerations suffice to override the FTCA's clear statutory text. Second, as discussed in Part III.B. above, every statute of limitations, including the FTCA's, is animated by compelling policy considerations that are best served by strict judicial interpretation. The Fourteenth Circuit does not explain why the considerations favoring leniency outweigh the policy determinations that motivated Congress, the Department of Justice, and the BOP to implement the FTCA's presentment requirement in the first place. Thus, even if policy considerations were dispositive, Respondent has given insufficient reasons to hold that these considerations command leniency. Third, the need for leniency in unusual circumstances is already met by doctrinal exceptions to statutes of limitations. For example, a court may deem a claim timely filed if a plaintiff's mail was unreasonably rejected, or the plaintiff has shown "excusable neglect," or if extenuating circumstances inhibited the plaintiff from accessing the mail, or under the doctrine of equitable tolling. See Huskey v. Fisher, 601 F. Supp. 3d 66, 76–78 (N.D. Miss. 2022) (explaining how these doctrines can be used to render a late

claim timely). But these arguments are conspicuously absent from the record, and the Court should not contort or disregarding its own precedent to make up for plaintiff's failure to plead them.

Lastly, the Fourteenth Circuit's concern about Fex silently overruling Houston is mistaken. R. at 15. The Government's interpretation is that Fex announces a general rule that inmates must obey textually unambiguous statutory filing guidelines; Houston provides an exception if, and only if, the statute is ambiguous and policy reasons clearly favor leniency. Thus, the Government merely suggests that Fex clarifies the outer limits of Houston which, unlike overruling by implication, is a commonplace phenomenon in Supreme Court jurisprudence. See generally Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861 (2014). Conversely, by reading Houston more expansively than its language permits, the Fourteenth Circuit's holding places these otherwise consistent cases at loggerheads, raising the very specter of silent overruling which it so strenuously cautions against. The courts of appeals agree that the Government's interpretation leaves these mutually compatible cases intact, as discussed next.

B. Most Courts of Appeals Have Adopted the Government's Interpretation of Fex.

"[V]irtually every circuit to have ruled on the issue has held that the mailbox rule does not apply to [FTCA] claims." Vacek v. U.S. Postal Serv., 447 F.3d 1248, 1252 (9th Cir. 2006); see, e.g., Smith v. Conner, 250 F.3d 277, 278 (5th Cir. 2001) ("Houston interpreted an undefined term in a federal rule of procedure; it did not announce a universal rule for prisoner filings. . . . [W]hen the language of the governing rule clearly defines the requirements for filing, the text of the rule should be enforced as written.") (citing Fex, 507 U.S. at 52); Nigro v. Sullivan, 40 F.3d 990, 995 (9th Cir. 1994) ("Fex instructs that Houston policies cannot override the plain meaning of a procedural rule."); Longenette v. Krusing, 322 F.3d 758, 762–63 (3d Cir. 2003) ("Houston's narrow holding . . . was designed to protect pro se prisoners in the absence of a clear statutory or

regulatory scheme."); Moya v. United States, 53 F.3d 501, 504 (10th Cir. 1994) ("Under the FTCA . . . a request for reconsideration is not presented to an agency until it is received by the agency. Mailing of a request for reconsideration is insufficient to satisfy the presentment requirement."); Garvey v. Vaughn, 993 F.2d 776, 782 n.15 (11th Cir. 1993) ("Houston is restricted to federal *court* filings; a notice of appeal given to prison authorities for delivery to a person or entity other than a federal court is not included in 'Houston's mailbox rule.'"); see also Velez-Diaz v. United States, 507 F.3d 717, 719–20 (1st Cir. 2007) (refusing to apply the mailbox rule to an FTCA claim because the statute's time limit is "a condition of the United States' waiver of sovereign immunity," and thus failure to comply is "a fatal defect."); Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993) (noting that presentment is "construed narrowly" and that an FTCA claimant bears the burden of showing it is met). District courts in circuits that have not yet ruled on this issue have recognized and adopted the majority rule. See, e.g., Boomer v. Deboo, No. 2:11-CV-07, 2012 WL 112328, at *2 (N.D.W. Va. Jan. 12, 2012) (noting that the Fourth Circuit has yet to address this issue, and following "virtually every other circuit" by holding that "the mailbox rule does not apply to [FTCA] claims") (quoting Vacek, 447 F.3d at 1252); Lakin v. U.S. Dep't of Just., 917 F. Supp. 2d 142, 145–46 (D.D.C. 2013) (declining to apply the mailbox rule to a FOIA appeal because the administrative receipt requirement distinguished it from Houston).

Only two Courts of Appeals disagree. The Second Circuit extended Houston to FTCA claims because it felt there was "no difference between the filing of a court action," the subject of Houston, and "the filing of an administrative claim." Tapia-Ortiz v. Doe, 171 F.3d 150, 152 (2d Cir. 1999). However, the Second Circuit agreed, in line with Petitioner's argument, that "Houston does not apply, of course, when there is a specific statutory regime to the contrary." Id. at 152 n.1 (citing Fex, 507 U.S. at 43). Thus, the Second Circuit's holding seemingly hinges on a specious

distinction between administrative regulations and statutes. The FTCA's administrative requirements are "issued by an agency pursuant to statutory authority," thereby giving them "the force and effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979); 28 U.S.C. § 2672. Accordingly, the Second Circuit's conclusion was flawed and should not be followed.

The Seventh Circuit held that Houston applies to FTCA claims for two reasons: first, because to hold otherwise suggests that Fex silently overruled Houston, Censke v. United States, 947 F.3d 488, 492 (7th Cir. 2020), and second, because it read Fex to call for an interest-balancing analysis which, in the case of inmate FTCA claims, favors claimants like Young. Id. at 492–93.

Both rationales are unpersuasive. First, as discussed in Part IV.A., Petitioner's reading of Fex is perfectly compatible with Houston. The Seventh Circuit tries to reconcile the cases by claiming that policy considerations absent from Fex gave the Houston Court "sufficient basis to depart from the receipt-based rule applicable 'in the ordinary civil case.'" Id. at 491 (citing Houston, 487 U.S. at 273). If this were true, the Houston Court would have simply said so, rather than dwelling on the Federal Rules' textual ambiguity before eventually turning to policy and fairness. Houston, 487 U.S. at 274. Second, the Seventh Circuit's assertion that Fex espouses an interests-balancing approach is incorrect. The Fex Court considered the balance of harms only as an interpretive aid, and only because "the text alone [was] indeterminate." Fex, 507 U.S. at 52 (rejecting inquiries as to "fairness"). The Seventh Circuit's construal of Fex and Houston as being about balancing the parties' interests is an unfounded judicial outlier that should not be followed.

CONCLUSION

For the foregoing reasons, Respondent's invocation of the prison mailbox rule does not apply to the FTCA's statute of limitations, which is controlling under Houston and Fex. The Court should therefore reinstate the district court's grant of summary judgment for Petitioner.

Applicant Details

First Name	**Cameron**
Last Name	**Misner**
Citizenship Status	**U. S. Citizen**
Email Address	**ctm76@cornell.edu**
Address	**Address** **Street** **110 Osmun Pl. Apt 2E** **City** **Ithaca** **State/Territory** **New York** **Zip** **14850**
Contact Phone Number	**317-946-5954**

Applicant Education

BA/BS From	**University of Indianapolis**
Date of BA/BS	**May 2021**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dorf, Michael
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Beth Robinson
U.S. Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson,

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am a rising third-year student ranked first in my class at Cornell Law School where I serve as Cornell University's Lead Respondents' Code Counselor, an Articles Editor for the *Cornell Law Review*, and a Bench Editor for the Moot Court Board. I spent last summer working on civil rights litigation at a plaintiffs' firm founded by a Cornell Law alumnus, and I am working this summer for leading labor boutique O'Donoghue and O'Donoghue in their Washington, D.C. office.

I have included my resume, my law school and undergraduate transcripts, a writing sample, and letters of recommendation from Professors Michael Dorf, Maggie Gardner, and Lara Freed. Should you require any additional information, please do not hesitate to let me know. Thank you for considering my application.

Sincerely,

Cameron Misner

Cameron Misner

Ctm76@cornell.edu | 317-946-5954 | 110 Osmun Pl. Apt 2E, Ithaca, NY 14850

EDUCATION

Cornell Law School — Ithaca, NY
Candidate for Juris Doctor — May 2024
GPA: 4.088 (Ranked #1).
Honors: Kasowitz Prize for Excellence in Legal Writing and Oral Advocacy; Myron Taylor Scholar; CALI Awards (8): Torts, Lawyering I, Lawyering II, Civil Procedure II, Criminal Law, Public International Law, Administrative Law, Antitrust Law.
Activities: *Cornell Law Review*, Articles Editor; Lawyering Program Honors Fellow; Academic Peer Advisor; First Amendment Clinic; Cornell Law Basketball Team.
Moot Court: Faust F. Rossi Competition 2023, oral-argument Finalist and best-brief Finalist; Cuccia Cup 2022, oral-argument Quarterfinalist; Moot Court Board, Bench Editor.

University of Indianapolis — Indianapolis, IN
Bachelor of Arts in Political Science, *summa cum laude* — May 2021
GPA: 4.0
Honors: Dean's List (every semester); GLVC Brother James Gaffney Award; Roland T. Nelson Scholarship; Dwight L. Smith Award for Excellence in Research and Writing; Full Tuition Athletic Scholarship.
Thesis: *The Constitution is What the Judges Say It Is: How Politics Influence Supreme Court Justices*.
Activities: Quarterback on the football team; Student Athlete Advisory Council.

EXPERIENCE

O'Donoghue and O'Donoghue, LLP — Washington, DC
Summer Associate — May 2023 – August 2023
Research legislative history to bolster arguments in a rulemaking petition. Research and draft memo predicting an appropriate bargaining unit in a petition for union representation.

Cornell Law School — Ithaca, NY
Lead Respondents' Code Counselor — June 2023 – May 2024
Respondents' Code Counselor — August 2022 – May 2023
Represent Cornell students and faculty accused of violating University rules. Advise clients of their rights and investigate facts. Draft opening and closing statements and examine and cross-examine witnesses at hearings. Manage caseloads and office logistics. Collaborate and liaise with University leadership.

The Lacy Employment Law Firm — Philadelphia, PA (remote)
Law Clerk — May 2022 – August 2022
Drafted a brief supporting a motion for reconsideration of an order excluding expert testimony. Co-drafted a brief opposing a motion to dismiss Title VII, Section 1981, and breach-of-contract claims. Researched and crafted new arguments for liability under Section 1981 and Title VII.

Highland Golf and Country Club — Indianapolis, IN
Caddie and Outside-Services Specialist — May 2021 – July 2021

FedEx Ground — Indianapolis, IN
Package Handler — May 2020 – August 2020

PUBLICATIONS

Note, *Dependent Contractors?: The Case for Giving Non-competes a Central Role in Worker-Classification Tests Under Federal Law*, 109 CORNELL L. REV. (forthcoming March 2024).

INTERESTS

Golf, intramural sports, fitness, country music.

Cornell Law School - Grade Report - 06/02/2023

Cameron Misner T Misner

JD, Class of 2024

Course	Title	Instructor(s)	Credits	Grade	
Fall 2021 (8/24/2021 - 12/3/2021)					
LAW 5001.1	Civil Procedure	Clermont	3.0	A+	
LAW 5021.1	Constitutional Law	Dorf	4.0	A	
LAW 5041.2	Contracts	Kadens	4.0	A	
LAW 5081.5	Lawyering	Freed	2.0	A	CALI
LAW 5151.2	Torts	Hans	3.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	4.1237
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	4.1237

^ Dean's List

Spring 2022 (1/18/2022 - 5/2/2022)					
LAW 5001.2	Civil Procedure	Gardner	3.0	A	CALI
LAW 5061.1	Criminal Law	Arnaud	3.0	A+	CALI
LAW 5081.5	Lawyering	Freed	2.0	A	CALI
LAW 5121.1	Property	Dinner	4.0	A-	
LAW 6791.1	Public International Law	Rostow	3.0	A+	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	4.0440
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	4.0851

^ Dean's List

Fall 2022 (8/22/2022 - 12/16/2022)					
LAW 6011.1	Administrative Law	Rachlinski	3.0	A+	CALI
LAW 6101.1	Antitrust Law	Hay	3.0	A+	CALI
LAW 6881.651	Supervised Writing/Teaching Honors Fellow Program	Freed	2.0	SX	
LAW 6898.1	The Art of Negotiation in Business & Sports	Huyghue	2.0	S	
LAW 7867.301	First Amendment Law Clinic 1	Hans/Jackson/Murray/Neitzey	4.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	10.0	10.0	4.1980
Cumulative	45.0	45.0	45.0	45.0	41.0	41.0	4.1126

^ Dean's List

Spring 2023 (1/23/2023 - 5/16/2023)					
LAW 6401.1	Evidence	K. Weyble	4.0	A	
LAW 6431.1	Federal Courts	Gardner	4.0	A	
LAW 6881.655	Supervised Writing/Teaching Honors Fellow Program	Freed	2.0	SX	
LAW 7868.301	First Amendment Law Clinic 2	Hans/Jackson/Murray/Neitzey	3.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	11.0	11.0	4.0000
Cumulative	58.0	58.0	58.0	58.0	52.0	52.0	4.0888

^ Dean's List

Total Hours Earned: 58

June 2023

Cornell Law School

Lawyers in the Best Sense

Cornell Law School Grading Policy for JD Students

Faculty grading policy calls upon each faculty member to grade a course, including problem courses and seminars, so that the mean grade for JD students in the course approximates 3.35 (the acceptable range between 3.2 and 3.5). This policy is subject only to very limited exceptions.

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

Class Rank

As a matter of faculty policy, we do not release the academic rankings of our students. Interested individuals, including employers, have access to the top 10% approximate cumulative grade point cut off or the most recent semester of completion. In addition, at the completion of the students second semester and every semester thereafter the top 5% approximate cumulative grade point average is also available. In general students are not ranked however the top ten students in each class are ranked and are notified of their rank.

Class of 2023 [six semesters]:

5% - 3.9204; 10%- 3.8364

Class of 2024 [four semesters]:

5% - 3.9048; 10% - 3.7897

Class of 2025 [two semesters]:

5% - 3.9475; 10% - 3.8350

Dean's List

Each semester all students whose **semester** grade point average places them in the top 30% of their class are awarded Dean's List status. Students are notified of this honor by a letter from the Dean and a notation on their official and unofficial transcripts.

Myron Taylor Scholar

This honor recognizes students whose cumulative MPR places them in the top 30 percent of their class at the completion of their second year of law school. Students are notified of this honor by a letter from the Dean of Students.

Academic Honors at Graduation

The faculty awards academic honors at graduation as follows: The faculty awards the J.D. degree summa cum laude by special vote in cases of exceptional performance. The school awards the J.D. degree magna cum laude to students who rank in the top 10% of the graduating class. Students who rank in the top 30% of the class receive the J.D. degree cum laude unless they are receiving another honors degree. For the graduating Class of 2023, the GPA cut off for magna cum laude was 3.8364 and for cum laude was 3.6627. Recipients are notified by a letter from the Dean and a notation on their official and unofficial transcripts.

The Order of the Coif is granted to those who rank in the top 10% of the graduating class. To be eligible for consideration for the Order of the Coif, a graduate must be in the top 10% with 75% of credits taken for a letter grade.

Prior to fall 2018, faculty who announced to their classes that they might exceed the cap were free to do so. If the 3.5 cap was exceeded in any class pursuant to such announcement, the transcript of every student in the class will carry an asterisk (*) next to the grade for that class, and for various internal purposes such as the awarding of academic honors at graduation, the numerical impact of such grades will be adjusted to be the same as it would have been if the course had been graded to achieve a 3.35 mean.

For detailed information about exceptions and other information such as grading policy for exchange students please go to the Exam Information & Grading Policies link at http://www.lawschool.comell.edu/registrar.

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing in extremely strong support of Cameron Misner for a position as a law clerk in your chambers following his graduation from Cornell Law School next year. Cam is currently first in his class—hardly surprising to me, given how he excelled as a first-year student in my constitutional law course.

As you will see from the balance of Cam's application, he is a stellar student. In addition to earning top grades in his courses, Cam serves as an Articles Editor of the Cornell Law Review, an Honors Fellow for first year writing (which requires him to provide extensive feedback), and a Respondent's Code Counselor—the rough equivalent of a defense attorney for students (mostly undergraduates) accused of violating Cornell's disciplinary code. Each of these positions demands considerable time commitments and carries substantial responsibility. Cam was chosen for each because he was deemed highly trustworthy.

Cam stood out in my constitutional law class as extremely quick to grasp the law's logic and unsatisfied with superficial answers. I recall one time he visited me during office hours to express frustration with the lack of a consistent explanation in the Supreme Court's separation-of-powers cases for why some rulings accepted functional justifications for novel institutional arrangements (like the independent counsel), while other decisions insisted on formal rules (as in the invalidation of the legislative veto and the line-item veto). We discussed at length the leading (only partly successful) attempt in the literature to reconcile the disparate results by asking, as a threshold inquiry, whether a particular arrangement aggrandizes the branch responsible for it. Cam rightly objected that, depending on the baseline, virtually any arrangement will increase some branch's power at the expense of one or both of the others. I was floored by the sophistication of Cam's analysis and how quickly he was able to propose counter-arguments to his own arguments.

Cam wrote an outstanding exam for my class—as he apparently did for all of his classes. He writes expertly, comfortably using the relevant legal categories to organize his answers without detracting from the naturalness of his prose. That same quality comes through in the writing samples he submitted. Cam is of course a good legal writer, but mostly he is simply an excellent writer, full stop.

Cam will hold up well under pressure. As a former college quarterback who didn't panic under a pass rush, he can surely handle a deadline. He has a winning personality and a calm, unflappable style. I recommend him enthusiastically.

Sincerely yours,

Michael C. Dorf

Robert S. Stevens Professor of Law

Michael Dorf - michaeldorf@cornell.edu - (607) 255-3890

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to enthusiastically and whole-heartedly recommend Cameron Misner to you as a law clerk for your chambers. He is extraordinary. I urge you to read this letter in its entirety, but the bottom line is that Cam is not only brilliant, with a top-notch analytical mind, but also a true gem of a person.

I first met Cam as a first-year student in my spring civil procedure class. He was not a "gunner"; he did not assert himself aggressively into every debate. Rather, he was a "pearl dropper": a calm presence who can be counted on to say precisely the most insightful thing at precisely the right time. For example, I spend just two days on tribal jurisdiction, mostly to alert students to the existence of tribal governments. After other students had struggled to fit Strate v. A-1 Contractors into the two-exception framework of Montana v. United States, Cam piped up with a theoretically nuanced critique of Montana's underlying rationale, suggesting a different workaround that demonstrated a synthesized understanding of multiple challenging cases. Even when not volunteering, his cold calls were impeccable, his questions incisive, and his attitude always bright, humble, and engaging. His exam was almost perfect, with clear organization and polished writing (despite the time pressure) and a deep understanding of even the trickiest issues (like non-mutual issue preclusion and supplemental jurisdiction). His exam tied one other student's as the best exam out of their class of more than 70 students.

At Cornell, we recognize such achievement with "CALI" awards, which we are only allowed to give to one or two students per class. My jaw hit the floor when I saw Cam's full transcript. His lowest grade is an A. In the majority of his graded courses, he is at the very top of the class as indicated either by A-pluses—which are rare at Cornell—or CALI awards. Of particular note, he earned a CALI in Lawyering (our primary research and writing class) both semesters of his 1L year and is now an Honors Fellow (a student TA) for the Lawyering program. Being selected as an Honors Fellow connotes not only top-notch writing ability, but also top-notch people skills. What makes Cam's transcript even more impressive is that he is not gaming the system by seeking out ungraded or uncurved courses to protect his impressive GPA (as some of our students do). In his 2L fall, Cam took two major black-letter law courses (Antitrust and Administrative Law) from two of our most demanding professors (Jeff Rachlinski and George Hay) and earned both A-pluses and CALI awards in both classes.

This is a truly extraordinary transcript. But I shouldn't have been surprised. Cam is currently in my Federal Courts class (as a 2L), and based on his class participation and questions, it is clear that he is understanding the material at a deeper conceptual level and with greater nuance than many of his colleagues. That observation is not meant to disparage my other students, who are among my very best and most favorite students; it is instead a superlative compliment of Cam's analytical and synthetic ability.

But again, I cannot stress enough that while Cam "gets it" more easily and more thoroughly than just about any other student I have taught at Cornell, he never makes himself the center of attention in the classroom. He is a dream student in that sense, and I suspect that will translate into him being a dream law clerk as well. He will do the work easily and expertly, but he will also be a pillar of support for other members of your chambers. He is the sort of person who could softly point out oversights or errors in another's work, raise difficult questions without invoking defensiveness, or open up a new line of inquiry with a casual observation.

Finally, I have the sense that Cam is well-rounded and down-to-earth, despite his stellar academic achievements and extensive extracurricular activities. He graduated summa cum laude with a perfect GPA from the University of Indianapolis even while playing quarterback on the football team (he attended college on a full athletic scholarship). Similarly here at Cornell, he has built his impressive transcript even while carrying heavy extracurricular commitments with the law review and moot court competitions (he was a finalist in our recent Rossi moot court competition and a quarter-finalist in last fall's Cuccia Cup). Meanwhile, Cam has maintained a commitment to a public service law career, spending his 1L summer at a plaintiff-side civil rights firm and his upcoming summer working in labor law, on top of volunteer and clinical work here. He is, in short, a good egg.

Cam represents the best Cornell has to offer, and he will be a superlative clerk and a joy to mentor. I would be delighted to speak further about Cam if I can be of any additional assistance. You can always reach me by email at mgardner@cornell.edu or on my mobile at (202) 413-0716.

Sincerely,

Maggie Gardner
Professor of Law

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to recommend Cameron Misner, a Class of 2024 student currently ranked first in his class at Cornell Law School, for a clerkship position in your chambers. Cam is, in short, a superstar. He completed his undergraduate degree in three years on a full tuition athletic scholarship as a quarterback and graduated with a 4.0 GPA. He continues to excel academically in law school and, at the same time, he devotes himself to multiple leadership roles on campus. Cam's outstanding writing and analytical skills, strong work ethic, easygoing nature, and professionalism make him a wonderful candidate for a clerkship position.

Cam was a student in my Lawyering course during the 2021-22 academic year, and he was the only student (out of a class of thirty-three students) to earn an A in the fall semester. He went on to receive the CALI award for top performance in Lawyering for both the fall and spring semesters, and he earned the Kasowitz Prize for Excellence in Legal Writing and Oral Advocacy (given to one student from each Lawyering section, which amounts to six students from the 1L class). I selected Cam as one of my Honors Fellows (teaching assistants) for my Lawyering course during the 2022-23 academic year. (During the fall semester of Lawyering, students write open- and closed-universe predictive memos and perform a simulated oral presentation to a supervisor; during the spring semester, students write and revise a persuasive brief and conduct a simulated pretrial oral argument.)

As a Lawyering student, Cam read cases and fact patterns with a critical eye, and his writing was consistently clear and concise. He asked insightful questions during office hours and conferences, and he was articulate and poised during oral presentations. Cam also collaborated well with his peers in class.

As an Honors Fellow, Cam successfully mentors first-year students, critiques student work, co-teaches classes on Bluebook citation form, monitors in-class group exercises, and participates in role-playing simulations. Not surprisingly, the sign-up sheet for Cam's office hours are typically the first to fill up; even though Cam seems to naturally grasp complex concepts, he is still able to translate those concepts for students who struggle to understand. Indeed, on my Lawyering course evaluations this past fall, a student praised the Honors Fellows for their guidance and added "especially Cam."

As a member of a team of four Honors Fellows, Cam works closely and effectively with his peers. He submits thorough outlines (which he exchanges with the other Honors Fellows) for each Lawyering writing assignment, and he comes to weekly Honors Fellow meetings prepared to discuss anticipated trouble spots for first-year students. Cam not only accurately predicts those trouble spots but also offers solutions.

Overall, I am impressed by how Cam balances competing obligations, never appearing ruffled despite serving as a Cornell Law Review Articles Editor, Academic Peer Advisor, Respondent's Code Counselor, and Honors Fellow for the Lawyering Program. Most recently, Cam advanced to the final round of the Rossi Moot Court Competition at Cornell Law.

I feel lucky to have Cam on my Honors Fellow team, and I am confident that he would be an asset to your chambers. Please do not hesitate to call me at the number listed above if you have any questions or need any additional information.

Sincerely,

Lara G. Freed
Clinical Professor of Law

Lara Freed - lgf28@cornell.edu - 607-255-5889

Cameron Misner | ctm76@cornell.edu

Writing Sample

The following writing sample is the two sections of a brief in opposition to a Rule 12(b)(6) motion to dismiss that I wrote while working at The Lacy Employment Law Firm. The firm has approved my using this document as a writing sample. In Section V, I argue that our clients stated a valid claim under Title VII because our clients were employees, not independent contractors. Then, in Section VI I argue that our clients stated a valid claim for breach of contract, focusing on Pennsylvania's implied duty of good faith and fair dealing. I have omitted each section of the brief that I did not write and have included only my original, unedited work. On December 28, 2022, the court denied the motion to dismiss and held that our clients stated cognizable claims. *Clemente v. Allstate Ins. Co.*, No. 2:22-CV-00056-CCW, 2022 WL 17976324 (W.D. Pa. Dec. 28, 2022). Parts III.A and III.C.1 of the opinion deal with the issues I drafted.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERTO CLEMENTE JR.; KIMBERLY DSCHUHAN; RYAN NORTON; KAILEE CLEMENTE; AND THE ROBERTO CLEMENTE JR. FAMILY AGENCY LLC	CIVIL DIVISION
Plaintiffs,	Civil Action No.
ALLSTATE INSURANCE COMPANY; TOMAINO INSURANCE AGENCY; JOHN TOMAINO; AND JUSTIN YOUNG	
Defendants.	**JURY TRIAL DEMANDED**

RESPONSE IN OPPOSITION TO DEFENDANT ALLSTATE'S MOTION TO DISMISS

LEGAL STANDARD

[OMITTED]

ARGUMENT

I. [OMITTED]
II. [OMITTED]
III. [OMITTED]
IV. [OMITTED]
V. THE COURT SHOULD DENY ALLSTATE'S MOTION TO DISMISS PLAINTIFFS' TITLE VII CLAIMS BECAUSE ALLSTATE *EMPLOYED* EACH INDIVIDUAL PLAINTIFF AT ALL RELEVANT TIMES.

Allstate attempts to shirk its status as plaintiffs' employer with short shrift. In doing so, Allstate argues that its business model – one in which it forces every one of its agents into a noncompete agreement – is shielded against liability under federal employment laws. Taking Allstate's argument to its conclusion, a hypothetical woman who is harassed by one of Allstate's Field Sales Leaders would have no recourse under employment laws. She would have to choose to either endure the continued harassment or resign from her position. And if she chose to resign, she would remain unable to work in the insurance industry for an entire year based on Allstate's non-compete agreement. (*See* Ex. 4, ¶ 7.) Allstate cannot maneuver so easily around being an employer while simultaneously exercising such significant control over its agents.

A. The proper test is Allstate's right to control Plaintiffs' work, not the mere words in the contract.

Allstate's contentions notwithstanding, courts in Title VII cases determine whether a hired party is an employee not by the mere label used in the contract, but by looking to common-law agency criteria, which help measure "the hiring party's right to control the manner and means by which the hired party accomplishes the product." *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 214 (3d Cir. 2015) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)); see also *Thange v. Oxford Glob. Res., LLC*, Civil Action No. 19-5979, 2022 U.S. Dist. LEXIS 101301,

at *12 (D.N.J. June 7, 2022) (holding that a reasonable jury could find an employment relationship between plaintiff and defendant despite specific contract language stating that plaintiff was an independent contractor and not an employee). The so-called *Darden* inquiry includes a list of twelve factors, and the Third Circuit directs its focus to three of them: whether the purported employer paid the purported employees, hired and fired them, and exercised control over their daily activities. *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013). Ultimately, however, the *Darden* factors are non-exhaustive and not meant to be applied in a rigid or formulaic manner because they are merely analytical tools; the right to control is the determinative metric. *Faush*, 808 F.3d at 214.

Here, Plaintiffs have pleaded sufficient allegations of employer-level control under the Third Circuit's three primary *Darden* factors, and under the remaining *Darden* factors. Additionally, Allstate's requirement that Plaintiffs sign non-compete agreements should raise a strong presumption that Plaintiffs were employees.

B. Plaintiffs have pleaded sufficient facts such that the Darden test would plausibly yield a finding of an employment relationship.

The Third Circuit has found hired parties to be employees in circumstances analogous to the present case. In *Faush*, for example, the Third Circuit held that a rational jury could have found that the defendant, a retail store who hired plaintiffs from a staffing agency, was the plaintiffs' employer because the defendant-store had day-to-day control over the plaintiffs' work activities. *Id.* at 216. The court recognized that even though the defendant only paid for the plaintiffs' work indirectly and could not terminate the plaintiffs' employment at the staffing agency, the defendant nonetheless had the right to dictate the plaintiffs' activities and supervise their work, furnished the plaintiffs with training and necessary tools, and had the right to demand replacement workers from the staffing agency, all of which evidenced a substantial degree of control. *Id.* at 214-17. By

contrast, the pre-*Faush* and pre-*Covington* case upon which Allstate relies recognized that the only control retained by the defendant-insurance company was authority to appoint subordinate officers, govern the insurance policies the plaintiff sold, and require pre-approval of marketing materials. *Kahn v. Am. Heritage Life Ins. Co.*, 324 F. Supp. 2d 652, 656-57 (E.D. Pa. 2004). The *Kahn* court noted that the plaintiff retained discretion over her hours and location, and the court made no mention of any training requirements or provision of instrumentalities by defendant. *Id.*

Here, Plaintiffs have pleaded sufficient facts such that a finding of an employment relationship is plausible. Although Plaintiffs' compensation was commission-based and, like in *Faush*, only remitted from Allstate to the individual Plaintiffs indirectly, the compensation factor is counterbalanced by the fact that Allstate had the right to terminate the employment of each Plaintiff, which Allstate ultimately exercised. (SAC Ex. 3 § XV; ¶¶ 54, 114, 118, 238.) The day-to-day control factor weighs strongly in favor of an employment relationship because Allstate provided nearly all of the instrumentalities (e.g. SAC ¶¶ 193, 196, 206, 207, 209, 216, 232), had strict training requirements for all agents (*Id.* ¶¶ 195, 197), dictated office hours and locations (*Id.* ¶¶ 200-01, 217), could monitor and control Plaintiffs' computers (*Id.* ¶¶ 209, 213), and required Plaintiffs to do additional projects outside of selling insurance (*Id.* ¶¶ 233-34).

In addition to the Third Circuit's primary factors, several other *Darden* factors weigh in favor of an employment relationship. For example, the Contract did not set forth a definite duration of the relationship, but rather allowed Allstate or the Agency to terminate it whenever, which is consistent with an at-will employment relationship. (*Id.* ¶ 238.) Additionally, Allstate hired Plaintiffs to sell insurance, which is exactly the business that Allstate is regularly engaged in. (*Id.* ¶ 228.) Moreover, Allstate offered benefits to the individual Plaintiffs. (*Id.* ¶ 237.) Admittedly,

Allstate was not in charge of withholding the individual Plaintiffs' taxes, but that lone factor cannot transform Plaintiffs into independent contractors.

C. Allstate's requirement that Plaintiffs sign non-compete agreements further evidences Allstate's control over Plaintiffs' work because the agreements engender economic dependence on Allstate.

One consideration not specifically delimited in the non-exhaustive *Darden* factors, but crucial to the right to control, is how dependent the hired party is on the hiring party for work. The Third Circuit has recognized as much in the FLSA context. *Donovan v. Dialamerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985). Although the FLSA definition of "employee" is not guided by common-law agency criteria, *Rutherford Food Corporation. v. McComb*, 331 U.S. 722, 726-27 (1947), the test emphasizes the right to control and considers many of the Darden factors. *See Donovan*, 757 F.2d at 1385. Hiring parties can engender dependence through non-compete agreements, which limit a hired party's ability to independently contract with other hiring parties. *See, e.g.*, *Figueroa v. Precision Surgical, Inc.*, 423 F. App'x 205, 208 (3d Cir. 2011); *Swinney v. AMcomm Telecomms., Inc.*, 30 F. Supp. 3d 629, 634 (E.D. Mich. 2014). Given the following logical and prudential considerations, state case law, and pre-*Darden* agency law, the dependence engendered by non-compete agreements, like the ones Allstate requires (SAC ¶ 218), should raise a strong presumption that a hired party is an employee under the *Darden* analysis.

Logically, as one party's dependence on another increases, so too does the other's control of that party. To illustrate, it is useful to examine how economic dependence implicates some of the delimited *Darden* factors; for example, a party dependent on another for work will likely have a longer relationship with the hiring party than otherwise; a dependent party will likely complete additional assignments assigned to them by the hiring party; and a dependent party will likely submit to the hiring party's direction as to when and how long to work. Additionally, failing to

apply a presumption of employment could allow hiring parties to circumvent employment laws by structuring agreements such that the delimited *Darden* factors counsel finding an independent-contractor relationship, while using non-compete agreements to retain significant control.

Case law in the state courts lends further support to the proposition that economic dependence created by non-compete agreements is a strong indicator of an employer-employee relationship. In Pennsylvania, requiring a hired party to sign a non-compete agreement is strong evidence of control by the hiring party, which (like under *Darden*) is the ultimate metric for determining employment relationships for unemployment insurance purposes. *Lowman v. Unemployment Comp. Bd. of Review*, 235 A.3d 278, 300-01 (Pa. 2020). Many other state courts have made similar pronouncements. *See, e.g.*, *Idaho ex rel. Indus. Comm'n v. Skydown Skydiving, Ltd. Liab. Co.,* 166 Idaho 564, 462 P.3d 92, 101 (2020) (non-compete agreement "is usually more indicative of the type of control an employer typically exercises over an employee"); *State ex rel. Ugicom Enters. v. Morrison*, 2021-Ohio-1269, 2021 Ohio App. LEXIS 1247, at *11 (Ct. App.) ("[m]ost notably, the individuals were bound by a non-compete agreement… This level of exclusivity and ongoing association is indicative of an employer-employee relationship.") *Jensen Tech Servs. v. Lab. Comm'n*, 2022, 506 P.3d 616, 622 (Ut. Ct. App. 2018) (recognizing that noncompete clauses are indicative of an employer-employee relationship); *Handyman House Techs, LLC v. Miss. Dep't of Emp't Sec.*, 337 So. 3d 681 (Miss. App. 2022) (same); *Timster's World Found. v. Div. of Emp't Sec.*, 495 S.W.3d 211, 222 (Mo. Ct. App. 2016) (same).

Another source of support for using economic dependence as a presumption-creating factor can be found in the *Darden* opinion itself. Indeed, a ruling by the IRS, which the Supreme Court cited along with the Restatement (2nd) of Agency as an example of traditional agency-law criteria, lists as a factor whether the hiring party requires full-time work from the hired party, explaining

that "an independent contractor… is free to work when and for whom he or she chooses." Rev. Rul. 87-41. Thus, pre-*Darden* agency law, from which the *Darden* factors themselves derive, recognized that dependence on a single party for work is a strong indication that the dependent party is an employee, not an independent contractor.

Accordingly, Plaintiffs have not only pleaded facts indicative of an employment relationship under the Third Circuit's primary factors and the other *Darden* factors, but they have also pleaded their non-compete agreements, which ought to create a strong presumption that Allstate was Plaintiffs' employer.

VI. THIS COURT SHOULD DENY ALLSTATE'S MOTION TO DISMISS COUNT III BECAUSE PLAINTIFFS PROPERLY PLEAD BREACH OF CONTRACT.

A plaintiff states a claim for breach of contract under Pennsylvania law by alleging (1) the existence of a contract, including its essential terms; (2) breach of a duty imposed by the contract; and (3) resultant damages. *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (applying Pennsylvania law). Here, Allstate has not disputed the existence of a valid contract, nor that Plaintiffs suffered damages. Moreover, Plaintiffs have sufficiently pleaded Allstate's breach of specific contractual duties, including Allstate's obligations to provide Plaintiffs with signage and supplies; to allow Plaintiffs until December 1, 2020 to sell their book of business; and to provide 90 days' notice before terminating the Agreement.

A. Allstate had an obligation to perform its contractual duties in good faith.

A plaintiff properly pleads breach of a contractual duty when he identifies a specific obligation imposed by the contract and alleges facts establishing a failure to perform that obligation. *McPartland v. Chase Manhattan Bank USA, N.A.*, No. 1:22-CV-00284, 2022 U.S. Dist. LEXIS 99023, at *5 (M.D. Pa. June 2, 2022) (citing *Hart v. Univ. of Scranton*, 838 F. Supp. 2d 324, 327-28 (M.D. Pa. 2011). Under Pennsylvania law, contractual obligations include an implied

duty to perform those obligations according to the standards of good faith and fair dealing. *W. Run Student Hous. Assocs., LLC v. Huntington Nat'l Bank*, 712 F.3d 165, 170 (3d Cir. 2013). The duty of good faith ensures that contractual terms will be enforced according to the parties' reasonable expectations. *Id.*; *see also Haywood v. Univ. of Pittsburgh*, 976 F. Supp. 2d 606 (W.D. Pa. 2013) (noting that Pennsylvania courts follow Restatement (2nd) of Contracts § 205).

Deriving from the duty of good faith is an obligation that where a party is granted discretion under a contractual term, the party must exercise that discretion reasonably. *Presque Isle Colon & Rectal Surgery v. Highmark Health*, 391 F. Supp. 3d 485, 513 (W.D. Pa. 2019) (applying PA law). Thus, a plaintiff validly pleads breach of a contractual duty by alleging that a defendant performed its discretionary obligations discriminatorily. *See id.* at 512-13 (refusing to dismiss breach-of-contract claim where plaintiff alleged that defendant exercised its discretionary right to review and adjust reimbursement rates in bad faith by unilaterally and discriminatorily cutting rates.)

While Allstate asserts that "there can be no breach where a party is simply exercising its discretionary rights," the cases it cites for that proposition not only present weak analogies to the present case, but also themselves note that that contractual discretion is not unlimited. *Brown v. Agway Energy Servs., LLC*, 328 F. Supp. 3d 464, 472 (W.D. Pa. 2018); *Corsale v. Sperian Energy Corp.* 374 F. Supp. 3d 445, 457 (W.D. Pa. 2019). Neither the *Brown* court, nor the *Corsale* court dismissed the breach-of-contract claims because the defendants-private utility companies had unlimited discretion to set rates, but rather because plaintiffs' allegations in each case included only that defendants were charging higher-than-market rates, while the contracts gave defendants pricing discretion based on both market *and non-market* factors. *Brown*, 328 F. Supp. at 475; *Corsale*, 374 F. Supp. 3d at 457. Plaintiffs in both cases therefore failed to plausibly allege that defendants were not exercising reasonable discretion regarding the entirety of the factors they were

permitted under their contracts to consider. *Brown*, 328 F. Supp. at 476; *Corsale*, 374 F. Supp. 3d at 457-58.

B. Plaintiffs allege at least three specific breaches of Allstate's contractual obligations.

First, unlike the *Brown* and *Corsale* plaintiffs, Plaintiffs here have specifically alleged that Allstate was not acting pursuant to the reasonable discretion it was permitted under the contract when it denied Plaintiffs signage and materials. Although Allstate mischaracterizes the Contract's terms as providing that Allstate "may" furnish the agency with various materials that Allstate deems advisable, (Defs. Br. 26.), the contract in fact provides that Allstate "**will** furnish Agency such signs, forms, manuals, records, and other supplies as the Company deems advisable," and "**will** offer… such additional materials and supplies as the Company feels may be helpful." (Ex. 6 to SAC § IV.) Thus, if Allstate determined that something was advisable or helpful, it was obligated to provide or at least offer to provide it. Although Allstate's discretion lies in the determination of whether providing signs and supplies is advisable or helpful, Plaintiff has pleaded that Allstate timely provided signage, supplies, and website listings to other agencies in Plaintiffs' area. (SAC ¶¶ 41, 43-44, 47, 45-55, 66, 68-71). The logical inference is either that Allstate determined that providing these amenities to agencies was advisable - making its failure to provide them to Plaintiffs a breach of explicit terms - or that Allstate determined such provisions were not advisable for discriminatory reasons, thus violating the covenant of good faith and fair dealing.

Setting forth a second breach by Allstate, Plaintiffs have alleged that Allstate breached its obligation to permit Plaintiffs to sell their book of business before December 1, 2020. To be sure, Allstate retained discretion over whether potential buyers met the eligibility requirements, (Ex. 4 to SAC), but implied in that discretionary right is an obligation to consider in good faith potential

buyers that Plaintiffs procured. Plaintiffs have alleged at least three ways in which Allstate acted inconsistently with that good-faith obligation:

First, Allstate failed to communicate with Plaintiffs during the period in which Plaintiffs were trying to sell the book. (SAC ¶ 159-160.) Plaintiffs' reasonable expectations were that while they searched for a suitable buyer, Allstate would at least keep an open line of communication. Instead, however, Allstate offered nothing but radio silence, which made selling the book more difficult. (*See id.*)

Second, Allstate refused to approve at least one buyer for pretextual reasons. (SAC ¶ 129.) Although Allstate retained the right to approve or disapprove buyers, Plaintiffs reasonably expected that Allstate would not use that right as a tool to deprive Plaintiffs of their own contractual privileges. Any other understanding of Plaintiffs' right to sell the Book upon termination of the Contract would render the right essentially meaningless because Allstate could block the exercise of that right for any reason or no reason at all. *See Kamco Indus. Sales, Inc. v. Lovejoy, Inc.*, 779 F. Supp. 2d 416, 429 (E.D. Pa. 2011) (holding that Plaintiff had a justifiable expectation that Defendant would not use its discretion to deprive Plaintiff of its rights under the contract because reading such a right into the Contract would render those rights meaningless).

Third, Allstate ultimately gave away much of the book's contents before the December 1 deadline. (SAC ¶¶ 161, 309.) On its own, this is an explicit breach of Allstate's obligation to allow Plaintiffs to transfer their "entire economic interest in the business… upon termination." (Ex. 3 to SAC § XVI.B.) Taken with the foregoing allegations, it is also further evidence of Allstate's bad-faith interference with Plaintiffs' efforts to sell the Book.

Additionally, Allstate's assertion that Plaintiffs never procured an eligible buyer, (Defs.' Br. 28.), does nothing to counter Plaintiffs' allegations that Allstate intentionally stymied

Plaintiffs' ability procure such a buyer. *See Apalucci v. Agora Syndicate,* 145 F.3d 630, 634 (3d Cir. 1998) (citing, *inter alia*, *Borough of Nanty-Glo v. American Sur. Co. of N.Y.*, 316 Pa. 408, 175 A. 536, 537 (Pa. 1934)) (stating that where a party obstructs the performance of a condition precedent, the party may not capitalize on that failure).

The third specific breach Plaintiffs have alleged is that Allstate terminated the Agreement without providing the required 90-days' notice. Plaintiffs have alleged that Allstate falsely targeted them for fraud and then terminated the Agency Agreement mere days after first notifying Plaintiffs of said fraud allegation. (SAC ¶¶ 113-17.) The Agency Agreement provides that the Agreement is terminable by either party with or without cause, but if terminated by Allstate without cause, only upon 90-days' written notice. (Ex. 3 § XVII(B).) Because Plaintiffs have alleged that Allstate manufactured the purported cause for termination, the Agency Agreement required Allstate to provide 90-days' notice before terminating. And because Allstate only provided a few days' worth of notice, Plaintiffs were denied almost three months of business. Moreover, even if this Court reads the contract to confer substantial discretion on Allstate to determine what constitutes cause and what does not, that discretion cannot include making up a pretextual reason, as honesty is the most basic requirement in the covenant of good faith and fair dealing. *See, e.g.*, Restat 2d of Contracts, § 205, cmts. a, d.

Accordingly, Plaintiffs have properly pleaded that Allstate breached at least three contractual obligations, and the Court should deny Allstate's motion to dismiss Count III.

Applicant Details

First Name	**Gabriela**
Last Name	**Monico Nunez**
Citizenship Status	**U. S. Citizen**
Email Address	**gabriela.monico@yale.edu**
Address	**Address** Street **111 Sachem Street** City **New Haven** State/Territory **Connecticut** Zip **06511**
Contact Phone Number	**510-529-6558**

Applicant Education

BA/BS From	**University of California-Berkeley**
Date of BA/BS	**December 2013**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Journal on Regulation**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Eskridge, William
william.eskridge@yale.edu
203-432-9056
Negron-Gonzales, Genevieve
gnegrongonzales@usfca.edu
510-593-8110
Wishnie, Michael
michael.wishnie@yale.edu
_203_ 436-4780
Jolls, Christine
christine.jolls@yale.edu
203-432-1958

This applicant has certified that all data entered in this profile and any application documents are true and correct.

GABRIELA MONICO NUNEZ
111 Sachem Street, New Haven, CT, 06511 • gabriela.monico@yale.edu • 510.529.6558

June 12, 2023

Hon. Beth Robinson
Circuit Judge
U.S. Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year student at Yale Law School, and I am writing to apply for a clerkship in your chambers for the 2024-25 term or any term thereafter.

I would bring a unique perspective to this position due to my personal background. I am originally from El Salvador and immigrated to the United States at age 16. As a low-income, first-generation, and formerly undocumented student (I became a U.S. citizen in 2019), my lived experience and the experiences of similarly situated individuals shaped my understanding of how people who lack access to resources navigate the legal system. They also deepened my commitment to public service. After earning an undergraduate degree from UC Berkeley, I worked as an immigration paralegal for six years. I enrolled in law school thereafter, hoping to gain formal training in what I had long been doing for myself and others as an advocate.

My educational and professional experiences have positioned me to succeed as your judicial clerk. Before law school, my job required me to conduct legal research and write initial drafts of asylum briefs. At Yale Law School, I have further engaged with legal research and scholarship as a research and teaching assistant to Professor William Eskridge. Additionally, I have honed my analytical, research, writing, and oral advocacy skills through my involvement in the Worker and Immigrant Rights Advocacy Clinic (WIRAC). As part of my work with the clinic, I helped bring an action in federal court under the Federal Tort Claims Act; the clients are immigrant families that were separated at the U.S. border.

My application materials are enclosed. Professors William Eskridge, Christine Jolls, Genevieve Negrón-Gonzalez, and Michael Wishnie are submitting letters of recommendation on my behalf. Thank you for your time and consideration of my application.

Sincerely,

Gabriela Monico Nuñez ("Gabi")

GABRIELA MONICO NUNEZ

111 Sachem Street, New Haven, CT, 06511 • gabriela.monico@yale.edu • 510.529.6558

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D. *expected*, June 2024
Honors: NAACP Legal Defense Fund's Earl Warren Scholar; Hispanic Scholarship Fund; Dorothy Weller P.E.O. (Philanthropic Educational Organization) Scholar
Activities: *Yale Journal on Regulation* (Submissions Editor, Spring 2023-Present; Lead Editor, Fall 2021-Fall 2022); The Appellate Project (Fellow, Fall 2021-Spring 2023); Latinx Law Student Association (Board Member, Fall 2022-Spring 2023); First Generation Professionals (Board Member, Spring 2022)

UNIVERSITY OF CALIFORNIA, BERKELEY, Berkeley, CA
B.A., distinction and departmental honors, double major in Ethnic Studies and Chicano Studies, Dec. 2013
Honors: American Cultures Undergraduate Research Prize; Cal Leadership Award
Activities: Rising Immigrants Scholars through Education (Co-chair); Berkeley Student Cooperative (Board Member); *Nineteen Sixty-Nine*, *Ethnic Studies Journal* (Editor); UCLA Labor Center (Intern for California Domestic Worker Bill of Rights Campaign)
Other: Teaching assistant for undergraduate immigration policy course; co-instructor of creative writing course

PROFESSIONAL EXPERIENCE

DEPARTMENT OF JUSTICE, CIVIL DIVISION – FEDERAL PROGRAMS, Washington, D.C.
Summer Law Internship Program (SLIP), Aug. 2023 – Sept. 2023

WILLIAMS & CONNOLLY, LLP, Washington, D.C.
Summer Associate, June 2023 – Aug. 2023

MUNGER, TOLLES & OLSON LLP, Los Angeles, CA, and San Francisco, CA
Touchback; Summer Associate – Litigation, May 2023 – June 2023
Summer Associate – Litigation, May 2022 – July 2022
- Researched arguments in response to a district attorney's denial of a request to furnish police misconduct records.
- Analyzed case law and statutes regarding offers of judgment in civil rights matters; drafted memorandum examining client's liability for costs and fees in the event of a grant or denial of summary judgment.
- Researched case law and drafted memorandum analyzing whether courts within the Ninth Circuit treat short seller reports as corrective disclosures in actions alleging securities fraud.

PROFESSOR WILLIAM ESKRIDGE, New Haven, CT
Research Assistant (RA), July 2022 – Nov. 2022; May 2023 – Present
- Research the Administrative Procedure Act's legislative history and stakeholders' attitudes before its enactment.
- Research recent scholarship on the Major Questions Doctrine; draft memorandum summarizing findings.
- Cite-check multiple academic articles and a book chapter.

WORKER AND IMMIGRANT RIGHTS ADVOCACY CLINIC, New Haven, CT
Law Student Intern, Jan. 2022 – Present
- Represent immigrant families seeking damages in federal court under the Federal Tort Claims Act (FTCA); research case law and draft legal memoranda on the viability of FTCA claims; co-author complaint; appear in federal court for status conference; co-author opposition to motion to dismiss; co-lead strategy meetings.
- Represent Afghan national in affirmative asylum case.

PROFESSOR ROBERT HARRISON'S ADVANCED LEGAL WRITING COURSE, New Haven, CT
Teaching Assistant (TA), March 2023 – May 2023
- Met with and provided individualized feedback to eight law students working on a legal writing assignment, a memorandum; conferred with the professor about students' individual progress.
- Evaluated brief revision exercises.

PROFESSOR WILLIAM ESKRIDGE'S STATUTORY INTERPRETATION COURSE, New Haven, CT
Teaching Assistant (TA), Jan. 2023 – May 2023
- Researched law review articles, case law, and legislative history; synthesized information and shared it with students in preparation for TA group discussions; facilitated TA group discussions.
- Assisted with drafting the final exam by researching federal statutes and their legislative history.
- Hosted TA office hours; provided pastoral support; hosted session in preparation for the final exam.

SUSMAN GODFREY LLP, Los Angeles, CA
Summer Associate – Litigation, July 2022
- Reviewed, compiled, and synthesized relevant information from discovery responses, briefs, and pleadings.
- Researched litigation strategies of opposing counsel in high profile matter; drafted memorandum summarizing findings.

IMMIGRANT LEGAL DEFENSE, Oakland, CA
Paralegal, July 2020 – Aug. 2021
- Completed petitions and wrote declarations for guardianship cases before California courts.
- Prepared applications for Special Immigrant Juvenile Status and Deferred Action for Childhood Arrivals (DACA).

LAW OFFICE OF HELEN LAWRENCE, Oakland, CA
Paralegal, July 2015 – Dec. 2020
- Worked on cases of detained and non-detained immigrants; wrote declarations, researched country conditions, secured expert witnesses, and wrote first drafts of asylum briefs.
- Traveled to Texas (in 2015 and 2016) to provide free legal services to detained asylum-seeking women and children.
- Lobbied for immigrants' rights in Washington, D.C., through the American Immigration Lawyers Association.
- Ran free DACA renewal services program in 2017.
- Co-facilitated workshops on immigration law for local non-profits and educational pipeline programs.

EAST BAY SANCTUARY COVENANT, Oakland, CA
Paralegal, Feb. 2015 – Aug. 2015
- Conducted legal intakes of unaccompanied minors in removal proceedings.
- Wrote declarations, researched country conditions, and compiled documents in support of asylum applications.

TRIO STUDENT SUPPORT SERVICES, Oakland, CA
Academic Mentor, Aug. 2013 – May. 2015
- Helped community college students with their writing assignments and applications to transfer to four-year universities.
- Facilitated workshops and developed curricula on research, writing, and transferring to four-year universities.

UNIVERSITY OF SAN FRANCISCO, San Francisco, CA
Research Assistant, Nov. 2014 – July 2015
- Assisted Prof. Genevieve Negron Gonzales with two research projects about undocumented students in California's Central Valley and at the University of San Francisco.

IGNITE CALIFORNIA, Oakland, CA
Paid Intern, June 2013 – Aug. 2013
- Wrote lesson plans for girls' after-school program that aims to build political ambition and promote civic engagement.

PUBLICATIONS

Gabriela Monico, *Redefining Citizenship in the United States' Undocumented Immigrant Youth Movement*, *in* WE ARE NOT DREAMERS: UNDOCUMENTED SCHOLARS THEORIZE UNDOCUMENTED LIFE IN THE UNITED STATES 87 (Leisy Abrego & Genevieve Negron-Gonzales eds., 2020).

SKILLS & INTERESTS

Bilingual in English and Spanish; enjoy hiking, watching films, volunteering, and napping with 17-year-old dog (Kika).

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date01 Issued:

Record of: Gabriela Denis Monico Nunez Page: 1
Issued To: Gabriela Monico Nunez
Parchment DocumentID: TWBSS6IM

Date Entered: Fall 2021

Candidate for : Juris Doctor MAY-2024

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2021					
LAW	10001	Constitutional Law I: Group 4	4.00	CR	P. Kahn
LAW	11001	Contracts I: Section A	4.00	CR	S. Carter
LAW	12001	Procedure I: Section B	4.00	CR	J. Suk
LAW	14001	Criminal Law & Admin I: Sect C	4.00	CR	J. Whitman
		Term Units 16.00 Cum Units 16.00			
Spring 2022					
LAW	21027	Advanced Legal Research	2.00	H	J. Nann
LAW	21136	Employment and Labor Law	3.00	H	C. Jolls
		Substantial Paper			
LAW	21722	StatutoryInterpretRegState	3.00	H	W. Eskridge
LAW	30127	Worker&ImmigrantRightsClinic	2.00	H	M. Ahmad, C. Flores, S. Zampierin, M. Wishnie
LAW	30128	Worker&ImmigrantRts:Fieldwork	2.00	H	M. Ahmad, M. Wishnie, C. Flores, S. Zampierin, M. Orihuela
		Term Units 12.00 Cum Units 28.00			
Fall 2022					
LAW	20032	Advanced Legal Writing	2.00	H	R. Harrison
LAW	20557	Torts and Regulation	3.00	P	D. Kysar
LAW	20611	Immigration Law	4.00	H	A. Kalhan
LAW	30127	Worker&ImmigrantRightsClinic	2.00	H	M. Ahmad, K. Tyrrell
LAW	30128	Worker&ImmigrantRts:Fieldwork	3.00	H	M. Ahmad, K. Tyrrell
		Term Units 14.00 Cum Units 42.00			
Spring 2023					
LAW	21068	Antitrust	4.00	H	G. Priest
LAW	21601	Administrative Law	4.00	P	N. Parrillo
LAW	21649	Topics:BehavioralLaw&Economics	2.00	H	C. Jolls
LAW	30129	Adv WIRAC Seminar	1.00	CR	M. Ahmad, K. Tumlin, M. Wishnie, K. Tyrrell
LAW	30130	Advanced WIRAC Fieldwork	2.00	H	M. Ahmad, K. Tumlin, M. Wishnie, K. Tyrrell
		Term Units 13.00 Cum Units 55.00			

********** END OF TRANSCRIPT **********

LEG. SCHOL. YALENS. NOVI PORT. 13 Years XXIX A.M.N. DOM. MDCCCXXIV CONDIT.

Heath Abbott

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 08, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

Re: Clerkship Application of Gabriela Monico Nunez,
Yale Law School Class of 2024

Gabriela (Gabi) Monico Nunez, a rising third-year student at the Yale Law School, has asked me to write a letter in connection with her application for a clerkship with your Chambers at some point after she graduates in May 2024. I know Gabi as a student in my class introducing students to statutory interpretation, as an excellent research assistant, and as a teaching assistant in the statutory interpretation class.

I can recommend Gabi with great enthusiasm.

As you can see from her transcript and curriculum vitae, Gabi has been a serious student at the University of California, Berkeley, and now the Yale Law School. At the law school, she has been a leader in the Latinx Law Students Association and the First Generation Professionals. She has also been named an NAACP Legal Defense Fund's Earl Warren Scholar and a Dorothy Weller P.E.O. (Philanthropic Educational Organization) Scholar.

Additionally, she has already enjoyed enormous real world experience with the law. Before law school, she worked in a variety of organizations assisting immigrants, including asylum-seekers and others. In law school, she has worked very hard in our immigration clinic. This summer, she will be an intern at the Department of Justice and Williams & Connolly.

Finally, Gabi has compiled an exceptional grade record here at Yale Law (as she had at Berkeley). By my last count, she had 12 Honors and 2 Passes. She is taking tough courses like Statutory Interpretation and Antitrust and tough professors such as Christine Jolls.

The foregoing "formal" record understates the quality of what Gabi has accomplished and what she offers to you and to her country.

Gabi was born in strife-ridden El Salvador. Her mother is a survivor of the civil war in that country, and she brought Gabi and her siblings to this country when Gabi was sixteen. Living in poverty as an undocumented immigrant, and not speaking English, Gabi faced long odds in Azusa, California. Through hard work, she mastered the new language and earned a place at the University of California, where she graduated in 2013.

Between 2013 and 2021, when she entered Yale Law, Gabi worked as a paid intern and then a paralegal in offices helping and representing immigrants. In 2019, Gabi became an American citizen, and she has helped her parents and some of her siblings become lawful permanent residents in the United States.

Knowing about Gabi's background helps you appreciate the confidence I have in Gabi's abilities. She works harder than any other law student I know. She is selfless. She is devoted to the rule of law and appreciates American democracy more than most native-born citizens. She is generous. She is grateful. She is loving.

* * *

And she is a damn good law student. So more on that.

I first met Gabi Monico Nunez in Spring 2022, when she was a student in my course on Statutory Interpretation in the Regulatory State. This is a first-year preference course at the law school. For three credits, the course is a ton of work, because it has an ambitious set of goals: to introduce students to the constitutional and institutional framework of the modern regulatory state, as well as a thorough training in statutory interpretation and a baby introduction to administrative law. Over the years, the course has increasingly focused on doctrines, canons, and theories of statutory interpretation, typically as applied in Supreme Court or important agency cases. I hope you would agree that this agenda is essential material for modern lawyering and judging.

Gabi's Spring 2022 statutory interpretation class was intellectually and doctrinally intense. I organized the class better than I had done previously. With the aid of five teaching assistants, I was able to break out the students into smaller chat room groups on a regular basis, and in a few classes I spent hours meeting with the students myself in small groups. Generally, the students came to class ready to learn and often to debate Supreme Court analyses in cases like Sweet Home, King v. Burwell, and of course the recent debates in Bostock, Niz-Chavez, NFIB v. OSHA, Epic Systems, and other Supreme Court cases dominated by the instruments and canons associated with the new textualism—plenty of dictionaries, debates about grammar and ordinary-versus-legal meaning, Latin canons (like noscitur a sociis), and an alarming array of constitutional canons such as the major questions doctrine (aka anti-deference on steroids).

William Eskridge - william.eskridge@yale.edu - 203-432-9056

I demanded a ridiculous amount of work from the students for a three-credit course, as we covered tons of doctrine, the leading theories of statutory interpretation and the legislative process, and in-depth discussion of leading cases—including a few short writing assignments I required of all students. Although calm and modest, Gabi impressed me as a most serious student of statutes. Because she already knew a lot about statutory immigration law and its stakes for people, her attention was earnest and productive.

In any event, the final exam was the only basis for a grade in the course. Half of the exam consisted of issue-spotting questions based on Michigan's Elliott-Larsen Civil Rights Act of 1976, as frequently amended. The ELCRA is modeled on, and most of its provisions are borrowed from, Title VII of the Civil Rights Act of 1964 (as amended). The students had the borrowed statute rule under their belts, and were told that the Michigan Supreme Court majority follows the tenets of the new textualism. Hence, all the U.S. Supreme Court methodological rules and practices were relevant, as was Title VII case law sometimes.

My questions covered the map of statutory doctrine. The students had to grapple with word meaning, statutory structure, the interaction of different statutory schemes, agency deference or anti-deference, constitutional avoidance, and so forth.
This was a very hard, demanding exam—and Gabi aced the nine issue-spotters in Question 1. She had one of the highest grades in the class on that, as well as on Questions 2 and 3. Question 2 was a legislative history exercise the students brought with them (500 word limit on their answer), and Question 3 was a 1000-word essay that the students also brought with them to the exam. Overall, Gabi easily earned an Honors for Statutory Interpretation in the Regulatory State!

* * *

Based on her performance on the exam, I asked Gabi to be my research assistant last summer and for Fall 2022. Because she was gainly employed with law firm jobs last summer, Gabi was (like others I have retained) only able to work 5-10 hours most weeks. Yet she accomplished a lot:

■ Cite-checking, proofing, and adding new sources to my co-authored article, "Textualism's Defining Moment," to be published in the Columbia Law Review.

■ Impressive research for the theory chapter and the religion-vs-sexual minorities chapter of the new edition of my co-authored casebook on Sexuality, Gender and the Law.

■ Compiling a massive legislative history of the APA § Researched, compiled, and reviewed the legislative history of the APA as well as news articles discussing the efforts to enact the APA. This was essential work for my co-authored article "The APA as a Super-Statute," to be published as part of an APA Symposium by the Notre Dame Law Review.

For every project, Gabi was careful to understand what I wanted her to do and what format would be easy for me to use! Accordingly, she created a Sharepoint and uploaded relevant documents and quotations there.

Gabi was an excellent RA—and then she applied to be a TA (teaching assistant) for the Spring 2023 Statutory Interpretation class. I eagerly recruited her (she had to retire as an RA). As a TA in the course, Gabi worked with other TAs and with me to develop a syllabus that would facilitate learning by the students—and of course I made sure that the syllabus covered the current as well as historical approaches to statutes. Ultimately, the new textualism was the centerpiece of the course; this meta-focus on text has its problems, as I have documented, but it is essential for any Article III judge and their Chambers to be on top of.

In addition, Gabi was the team leader for a section of students. For many class days, the students met in these smaller sections to discuss a statutory issue that they would then report on as a group. These TA break-outs made the class a much better learning experience, I believe, and I am certain that Gabi was the perfect team leader. She provided her students with extra context beforehand and counseled them on the course and adjusting to law school in one-on-one sessions.

Her performance in my class, as a research assistant, and as a teaching assistant provides strong evidence that Gabi Monico Nunez is a learned student of the law, a dedicated professional, an outstanding team player, and virtually a saint as a person. Honest to goodness, I cannot praise her character enough.

You cannot go wrong with this applicant. Hence, I am most enthusiastic in recommending Gabi Monico Nunez for a clerkship.

If I can be of further assistance, please email me or call my cell, 917 991 5914.

Very truly yours,

William N. Eskridge, Jr.
John A. Garver Professor of Jurisprudence Yale Law School

UNIVERSITY OF SAN FRANCISCO School of Education

Genevieve Negrón Gonzales, Ph.D.
Associate Professor
University of San Francisco
School of Education
2130 Fulton Street
San Francisco, California 94117

June 9, 2023

Dear Judge,

It is an absolute honor to write a letter of recommendation for Gabriela Monico Nunez. She is one of the most impressive students I have ever taught in my 17 years of university-level teaching. I have known her for more than 15 years in a variety of capacities; she is a former student, served as a teaching assistant for a class I taught, worked as my research assistant, and is a contributing author to an award-winning book for which I serve as co-editor. Gabriela is undoubtedly in the top 1% of students I have ever had the opportunity to teach, and I enthusiastically and unequivocally support her application to clerk in your chambers.

I am a Professor of Education who has spent the last 17 years researching and writing about issues related to the rights of undocumented students. I first met Gabriela in 2009, when she was a new student leader on the UC Berkeley campus, championing the rights of undocumented students on that campus and more broadly in California's budding undocumented student movement. Though Gabriela was new to the UC Berkeley campus, she was recognized early on as a leader by her peers. When Gabriela enrolled in my course the following Spring, in 2010, I got to know her not just as a thoughtful and passionate student activist, but as a promising scholar and thought leader. I was so impressed by Gabriela, in fact, that when I taught a related class focused on educational justice and immigrant communities three years later, I selected her to serve as a Chancellor's Public Fellow and to work with me as a teaching assistant and coordinator for the "engaged scholarship" component of the class. This was a rare honor for an undergraduate student – most fellows were UC Berkeley graduate students. In this capacity, Gabriela coordinated and led a group of 15 undergraduate students in semester-long internship placements in community organizations around the Bay Area working on immigrant rights issues. I chose to work with Gabriela because I knew her maturity, skill, and impeccable reputation in the Bay Area immigrant rights movement would make her far more suitable for this position than many advanced doctoral students. I no longer work at UC Berkeley but have remained so impressed by the quality and depth of Gabriela's work that I brought her in to work with me as a research assistant at the University of San Francisco. Lastly, a few years ago my colleague Leisy Abrego (UCLA) and I began to work on an edited book that would showcase the important theoretical and empirical work done by undocumented (or formerly undocumented) scholars. We immediately reached out to Gabriela, convinced that a chapter based on her outstanding undergraduate thesis would serve as an anchor for the book; she worked tirelessly on this contribution, thoughtfully attending to the critiques and feedback raised in the peer review process. The result of this is her stellar chapter in a book by Duke University Press, titled *We Are Not Dreamers: Undocumented Scholars Theorize Undocumented Life in the United States*. The book won an International Latino Book Award in the multi-author, non-fiction category in 2021 and we have heard from numerous colleagues around the country that Gabriela's chapter has been taught in their classrooms across a variety of disciplines and institutions.

It is not only Gabriela's outstanding service to the undocumented youth movement that makes her stand out, it is also her personal story which fuels this passion for social justice and has made her into the impressive leader she is. What is so amazing about Gabriela is not simply her level of academic achievement – and it is worth saying that the quality of her scholarship and analysis rivals many of the doctoral students I have worked with – but the fact that she is not satisfied by these personal accomplishments. Gabriela has oriented her life to advancing the struggle for immigrant rights, through her involvement with various community-based immigrant rights organizations, her own academic scholarship, and her professional life. Her commitment is palpable and proven, and I have no doubt that she will continue to make an impact on these issues in an impressive manner.

Gabriela is poised, thoughtful, well-spoken, and articulate. She is passionate, bright, and talented. She is the sort of student teachers feel grateful to have in the classroom. She is the sort of leader who immediately garners the respect and admiration of her peers. She makes critical interventions, asks sharps questions, and makes space for the leadership of others. Her work is rooted in a strong, critical analysis, and in grounded, proven experience.

Gabriela has not had an easy path to the legal profession. Neither of her parents went to college. Her mother, a Salvadoran Civil War survivor, is illiterate. At age 16, Gabriela immigrated to the United States from El Salvador not speaking English. After arriving in this country, she reunited with her family. Acclimating to a new country was no easy feat for Gabriela. She and her family members were undocumented and low-income; they lived in an RV, had no access to health insurance, and struggled to make ends meet. Despite those barriers, Gabriela excelled academically and in the span of a semester went from being an English language learner to an honors student. Her hard work paid off and she attended UC Berkeley after graduating high school. In college, however, she had no access to financial aid (due to her formerly undocumented status) or help from her family; she had to work while going to school. She also commuted four hours during her first year and experienced housing instability; at one point, she slept in a student office at the UC Berkeley campus for a few months because she was homeless. After graduation, she continued experiencing hardships because she was ineligible for the Deferred Action for Childhood Arrivals Program (DACA). However, she eventually became a Lawful Permanent Resident and a U.S. citizen; this allowed her to access opportunities and help her family successfully navigate the immigration system.

Despite having had a difficult life, Gabriela has not let the obstacles in her way hold her back. On the contrary, she has overcome these obstacles and committed herself to assisting others in doing so, too. Gabriela has already achieved so much, but I am confident that she will amaze me even more in the future.

As someone who has seen Gabriela develop over the past decade, I have been excited to see her attending Yale Law School and taking the next step to fulfill the professional aspiration she has held tight to since I first met her as a college freshman. Her plans include becoming a litigator, so she would tremendously benefit from a clerkship in your chambers. Besides her impressive credentials, she will bring an invaluable perspective to your team. I am confident in asserting that Gabriela is among the very finest of those applying to clerk in your chambers.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Genevieve Negrón-Gonzales, Ph.D.
Professor, School of Education
University of San Francisco
GNegronGonzales@usfca.edu

June 12, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write in enthusiastic support of the application of Gabriela Monico, a rising third-year student at Yale Law School, for a clerkship in your chambers. Gabi is an extraordinary young woman.

Gabi was born in El Salvador and lived there until she was 16, when she came to the United States as an undocumented immigrant who spoke no English. Gabi's childhood was difficult. She attended ten schools in eleven years, one of five children raised in five different households due to poverty and challenging family relationships. Her father is indigenous (Mayan) and her mother, who cannot read or write, was a survivor of the Salvadoran Civil War. Gabi continued to experience intense poverty after she came to the United States and all the hardships of being undocumented, as well as family violence at home and teachers in her public high school who tried to hold her back in remedial classes. Nevertheless, Gabi excelled in school and earned a spot at the University of California – Berkeley. Neither parent helped pay for college, and Gabi was ineligible for financial aid due to her immigration status; she worked multiple jobs and experienced periods of homelessness while a student, and at other times had to commute four hours daily between school and shelter. Somehow, she was able to earn her undergraduate degree. Unable to work lawfully when she graduated, she survived in independent contractor positions until, eventually she obtained permanent resident status. She then spent a number of years as a paralegal for an immigration attorney.

Gabi arrived at Yale Law School in fall 2021. The intellectual abilities, discipline, work ethic, drive, and personal qualities that made that last sentence possible are rare, even in a law school so full of accomplished students. I met Gabi in her first semester, when she attended a dinner for first-generation students at my home, and she has been a student in the Worker & Immigrant Rights Advocacy Clinic for the past three semesters. She is brilliant, reflective, hard-working, and kind, and I'm delighted to recommend her.

In one matter, Gabi helped to research, draft, and file federal tort litigation in two family separation cases. Pursuant to the Trump Administration's notorious policy, in summer 2018 two children were separated from their parents in Texas and brought to Connecticut, while their asylum-seeking parents remained in detention at the border. Earlier students had won an order to reunite each child with each parent, J.S.R. by and through J.S.G. v. Sessions, 330 F.Supp.3d 731 (D.Conn. 2018), prompting their release and resettlement in Connecticut, and had filed administrative claims under the Federal Tort Claims Act (FTCA). When nation-wide negotiations to settle the tort claims of separated families broke down in late 2021, we had no choice but to proceed to litigation.

Over the course of 2022, Gabi and her partners mastered a voluminous record of prior immigration proceedings, habeas litigation, and medical history for the four clients. She then interviewed the clients and evaluated not only theories of FTCA liability, but also possible Bivens and Alien Tort Statute claims. Finally, Gabi helped draft a forty-page federal complaint, one that reflected careful and often difficult judgments about legal theories, anticipated defenses, and potential discovery. Her research ranged from state tort law to federal jurisdiction to international law, and over a wide array of procedural and substantive matters. We filed the case in summer 2022. Flores Benitez v. Miller, No. 3:22-cv-00884-JCH (D.Conn.). When Gabi returned to campus in the fall, she led the team in figuring out how to serve the individual defendants, including Jeff Sessions and Stephen Miller; developing a discovery plan and managing multiple court conferences; and drafting part of a brief in opposition to the government's motion to dismiss. She even had her first appearance in federal court, handling one of the status conferences. Gabi did an extraordinary job in helping to steer the team through this process, consulting with other lawyers handling similar cases, and in drafting and revising pleadings and briefing. She repeatedly brought her powerful research and analytic skills to bear on novel and difficult questions.

This spring, Gabi chose to rotate off Flores Benitez, instead taking on the representation of a recent Afghan refugee. She completed numerous memos on her client's eligibility for work authorization, compiled country conditions reports, and authored a portion of the brief we submitted in support of the client's asylum application. Gabi also interviewed and prepared her client for his asylum interview last month. She did an excellent job, and we now await decision.

In a third matter, Gabi represented New Haven Rising, a local racial justice organization, in drafting a neighborhood survey to identify community needs and preferences in allocating new funding received by the City of New Haven from federal pandemic relief, state tax re-allocations, and an increased voluntary contribution from Yale University. Gabi canvassed in New Haven neighborhoods, interviewed community members, and helped draft testimony for residents for New Haven Board of Alders meetings. She also authored part of a memo recommending how the city might fairly and equitably allocated its new funds, in a manner responsive to identified community needs.

Finally, Gabi handled one other matter, which I did not supervise directly. In this, she represented UNITE HERE Local 217, a union of hotel and hospitality workers, completing multiple research memos related to workplace violations and corporate structures at two New Haven hotels in the midst of union organizing drives.

Across all of these matters, Gabi's legal research and writing has been outstanding. She is also a patient collaborator with clients, allies, local officials, and student teammates. She is extremely smart, thoughtful, and kind. She can complete enormous amounts

Michael Wishnie - michael.wishnie@yale.edu - _203_ 436-4780

of work with swiftness and care. She will be an outstanding law clerk, and I'm thrilled to recommend her to you.

Sincerely,

/s/ Michael J. Wishnie

Michael J. Wishnie

Michael Wishnie - michael.wishnie@yale.edu - _203_ 436-4780

June 06, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to recommend Gabriela Monico Nunez, an extraordinarily talented Yale Law School student and NAACP Legal Defense Fund Earl Warren Scholar, for a clerkship in your chambers. Gabi is an incredibly compelling candidate whom I recommend to you with the greatest possible enthusiasm.

By way of background for this recommendation, I served as a law clerk myself both at the United States Court of Appeals for the District of Columbia Circuit and at the Supreme Court of the United States.

I know Gabi extremely well because she has been in two courses, Employment and Labor Law and a seminar, with me. She took Employment and Labor Law in her first year and wrote an outstanding end-of-term paper on how disparate impact liability under Title VII might have played out alongside the section 1981 claim brought against Proctor and Gamble for excluding Deferred Action for Childhood Arrivals (DACA) recipients from its internship program. A few things were clear from Gabi's work on this paper. First, Gabi is extremely bright; she is both a powerful and a precise legal thinker. Second, she is an excellent writer – clear, organized, careful, and engaging all at once. Third, she is both an incredibly efficient and an amazingly hard worker – a great and not extremely common combination. Fourth, she is wonderfully collaborative. In every discussion I have had with her over her time in law school, I have learned from her intellectually while also feeling confident that she is fully, and with ease, absorbing what I have to say.

She was in a small seminar with me this year, and her end-of-term paper displayed the same four traits as above but in even stronger form. I was particularly struck by the combination of clear power and unerring precision in her thinking, as well as by the way in which she is somehow a student who works incredibly efficiently and a student who puts in a huge number of hours and what a mighty combination that is.

I adore Gabi as a person. She is authentic, committed, and just all-around wonderful. I am completely confident that she would get along extremely well with everyone in chambers.

For all of these reasons, I recommend Gabi to you with the greatest possible enthusiasm. I hope that you will not hesitate to contact me, or have anyone from your chambers contact me, at christine.jolls@yale.edu or 203-432-1958 if there is any additional information I might be able to provide in connection with your consideration of her application.

Sincerely,

Christine Jolls
Gordon Bradford Tweedy Professor
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GABRIELA MONICO NUNEZ
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WRITING SAMPLE

I drafted the attached writing sample as an assignment in my Advanced Legal Writing course. The assignment required writing a closed-universe legal memorandum on an issue growing out of a dispute between a foreign seller and an American purchaser of a diesel engine, generator, and supporting equipment. The memorandum analyzes whether the transaction between the parties is governed by Article 2 of the Uniform Commercial Code (as adopted by Illinois). The analysis and writing are substantially my own, including revisions based on feedback that my professor provided. The memorandum has not been edited by others.

PRIVILEGED AND CONFIDENTIAL/ATTORNEY WORK PRODUCT/ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

To: Emilia Rodriguez, Supervising Attorney
From: Gabriela Monico Nuñez
Date: May 10, 2023
Re: Assessing whether the Illinois Commercial Code applies to Cax's agreement

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I. QUESTION PRESENTED

Our client, German company Cax, entered into the Hawaii Cogeneration Agreement (the "Agreement") with a subsidiary of Leo Laboratories ("Leo"). Leo is a pharmaceutical company headquartered in Illinois, and its subsidiary operates a manufacturing plant in Honolulu, Hawaii. In the Agreement, Cax agreed to sell Leo a diesel engine, generator ("diesel generator"), and auxiliary equipment (together with the diesel generator, the "Equipment"), for Leo's plant. As part of the transaction, Cax had to design, fabricate, test, deliver, and install the Equipment. Leo and Cax chose Illinois law to govern the Agreement, and Article 2 of the Illinois Commercial Code ("ICC") governs transactions predominantly in goods, but not services. Does the Agreement fall under Article 2 of the ICC?

II. BRIEF ANSWER

The transaction between Cax and Leo is likely to fall under Article 2 of the ICC. The Equipment, which is a central part of the Agreement, is a "good" as defined by the ICC. Although the Agreement mixes the sale of a good with the provision of services, its predominant purpose is the sale of the Equipment.

III. STATEMENT OF ASSUMED FACTS

Leo is invoking the Agreement's arbitration clause to seek damages for costs it incurred due to problems with the Equipment it purchased from Cax, our client. In 1982, Cax agreed to sell Leo the Equipment for the cogeneration facility that Leo was constructing in Honolulu,

Hawaii. Leo's Proposed Statement of Undisputed Facts ("Exh. 1") at 4-6; Hawaii Cogeneration Agreement ("Exh. 2") at 1. Cax and Leo chose Illinois law to govern the transaction. Exh. 1 at 9. The Agreement, which repeatedly refers to Leo as "Purchaser" and Cax as "Seller," states that Cax "shall design, fabricate, test, deliver to purchaser's site, provide technical guidance and assistance for installation and start-up, and sell the Equipment." Exh. 2 at 2. A subsequent Contract Change Order shifted the responsibility to install the machine from Leo to Cax. Exh. 1 at 15.

The Agreement has several express warranties: (1) The Equipment will be free from defects for 12 months after acceptance; (2) Cax will fabricate the Equipment according to a set of specifications; and (3) if a warranty defect arises, Cax's service representatives will be available to help within 24 hours after Leo reports the problem. Exh. 2 at 11.

The Agreement states that Cax is responsible for developing the final design of the Equipment and that it should keep Leo apprised of the status of the design. Exh. 2 at 5. The parties agreed to have a design conference 45 days after the signing of the Agreement. Id. The specifications, laid out in Exhibit A of the Agreement, establish performance standards for the Equipment. Id. at 12.

In June 1983, Cax shipped and delivered the Equipment to Leo's Hawaii plant. Id. at 15. Cax then trained Leo's employees on how to operate and maintain the Equipment. Id. Title to the Equipment passed to Leo upon delivery. Exh. 1 at 15; Exh. 2 at 7. No sales taxes were added to the purchase price in the Agreement. Exh. 2 at 3. Leo, however, was responsible for "all taxes, charges, import, duties, assessments, or other charges lawfully levied or assessed by Hawaii." Exh. 2 at 14. By December 1983 Cax had installed the Equipment. Exh. 1 at 15.

IV. APPLICABLE STATUTES

1. **810 Ill. Comp. Stat. 5/2-102 (2022). Scope Certain Security and Other Transactions Excluded from This Article**

   [T]his Article applies to transactions in goods . . . .

2. **810 Ill. Comp. Stat. 5/2-105 (2022). Definitions: Transferability: "Goods"; "Future" Goods; "Lot"; "Commercial Unit"**

   (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .

   (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale on future goods or of any interest therein operates as a contract to sell.

3. **810 Ill. Comp. Stat. 5/2-106 (2022). Definitions: "Contract"; "Agreement"; "Contract for sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation"**

   A "sale" consists in the passing of title from the seller to the buyer for a Price . . . .

4. **810 Ill. Comp. Stat. 5/2-501 (2022). Insurable interest in Goods; Manner of Identification of Goods**

   In the absence of explicit agreement identification occurs

   (a) when the contract is made if it is for the sale of goods already existing and identified;

   (b) if the contract is for the sale of future goods . . ., when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

   Official Comment: [I]n the ordinary case identification of particular existing goods as goods to which the contract refers is unambiguous and may occur in one of many ways. It is possible, however, for the identification to be tentative or contingent. In view of the limited effect given to identification by this Article, the general policy is to resolve all doubts in favor of identification . . . .

V. DISCUSSION

Article 2 of the ICC applies to "transactions in goods." 810 Ill. Comp. Stat. 5/2-102 (2022). To determine if Article 2 applies to the Agreement, the arbitration panel will first have to analyze whether the Equipment meets the code's definition of "goods." If it does, the arbitration panel will then examine whether the transaction is predominantly for the sale of the Equipment or for the provision of the various services that the Agreement required Cax to provide.

a. Prong 1: Is the Equipment a "Good" under the ICC?

The ICC defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . ." 810 Ill. Comp. Stat. 5/2-105 (2022). Courts applying Illinois law have held that the "coverage of 'goods' . . . should be viewed as being broad in scope so as to carry out the underlying purpose of the Code of achieving uniformity in commercial transactions." Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1976). See also Republic Steel Corp. v. Pa. Eng'g Corp., 785 F.2d 174, 181 (7th Cir. 1986) ("[W]e may not be unmindful of Illinois law underscoring the broad coverage of the U.C.C. and emphasizing the need for uniformity in commercial transactions.").

The ICC distinguishes between present goods, which exist at the time of the transaction, and future goods, which are not yet in existence at that time. The Equipment did not exist when the parties signed the Agreement. Future goods, like the Equipment, become identifiable to the contract when they are "shipped, marked or otherwise designated by the seller as goods to which the contract refers." 810 Ill. Comp. Stat. 5/2-501 (2022). Here, Cax shipped the components of the Equipment to Leo's plant in Honolulu, Hawaii. No later than at that moment, the Equipment

was both movable and identifiable, and therefore satisfied the definition of goods under Article 2 of the ICC.

A product that later becomes immovable following assembly and installation can still qualify as a good under Article 2. See Meeker v. Hamilton Grain Elevator Co.,442 N.E.2d 921, 923 (Ill. App. Ct. 1982). In Meeker, the plaintiff argued that movable steel pieces of grain bins were not identifiable until they were assembled and attached to concrete pads. Id. The plaintiff contended that Article 2 did not govern the contract because once the bins became identifiable, they would no longer be movable. Id. The court rejected the plaintiff's argument and held that the product was identifiable before the steel pieces were assembled into unmovable bins. Id. Like the steel pieces in Meeker, the Equipment's components were identifiable even though they would no longer be movable once assembled and installed. Therefore, the Equipment meets Article 2's definition of a good.

b. Prong 2: What is the predominant purpose of the transaction?

Although the Equipment is a good under Article 2 of the ICC, the Agreement also requires Cax to provide a variety of services. When Illinois courts determine whether Article 2 applies to a mixed contract for goods and services, they apply a predominant purpose test:

> The test for inclusion or exclusion is not whether [the contracts] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, installation of a water heater in a bathroom).

Meeker v. Hamilton Grain Elevator Co., 442 N.E.2d 921, 922 (Ill App. Ct. 1982) (quoting Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974)). Accord Tivoli Enter. v. Brunswick Bowling & Billiards Corp., 646 N.E.2d 943, 947 (Ill. App. Ct. 1995) ("Illinois courts, including this court, have repeatedly found that the test for the applicability of the UCC to a contract for the sale of

goods and for services is whether the predominant purpose of the contract is for services or for the sale of goods."). When applying the test, courts focus on several factors: (1) how the contract refers to the parties; (2) whether the transaction included a transfer of title; (3) whether the contract contains warranties; (4) whether the transaction includes a sales tax; and (5) how extensive and individualized the design involving the purchase is.

i. How does the Agreement refer to the parties?

Courts in Illinois have looked at how parties are denominated in a contract to assess the predominant purpose of the transaction they entered into. Meeker, 442 N.E.2d at 923; Nitrin, Inc. v. Bethlehem Steel Corp., 342 N.3.2d 65, 78 (Ill. App. Ct. 1976). If a contract refers to one party as "purchaser" and the other as "seller," those titles signal that the sale of goods was predominant. See, e.g., Meeker, 442 N.E.2d at 923 (finding that a contract for the sale of grain bins was for goods in part because the parties were denominated throughout the contract as "seller" and "purchaser"). In contrast, if one party is labeled as "owner" and the other as "contractor," those titles signal that the sale of services was predominant. See, e.g., Nitrin, 342 N.E.2d at 78 (finding that a contract for the construction of a converter, a key component of an ammonia plant, was for services in part because the parties were denominated as "owner" and "contractor").

Like the Meeker contract, the Agreement refers to Leo as "purchaser" and "Cax" as seller. These labels strongly suggest that the transaction was predominantly for the sale of goods.

ii. Did the Agreement provide for a transfer of title between the parties?

Article 2 of the ICC defines a sale as "the passing of title from the seller to the buyer for a price." 810 Ill. Comp. Stat. 5/2-106 (2022). When a contract transfers title to a good from the seller to the purchaser, the transaction is likely for the sale of goods. Cf. Nitrin, 342 N.3.2d at 78

(holding that Article 2 did not govern a contract in which the contractor never transferred title to a converter and instead arranged for the owner to purchase it from a third party).

Unlike the Nitrin contract, the Agreement specifies that title to the Equipment would pass to Leo upon its delivery at Leo's facility in Hawaii. This title transfer likely signals that the predominant purpose of the Agreement was the sale of a good.

iii. Does the Agreement contain warranties?

Another factor that courts examine is whether contracts contain warranties. If a contract contains warranties on goods, the transaction is predominantly for the sale of goods. Tivoli Enter., 646 N.E.2d at 948 (underscoring that services were incidental partly because the contract's one-year warranty ran to the goods involved in the transaction). Accord, Bonebrake, 499 F.2d at 958 ("[Plaintiff] warranted that the lanes would be 'free from defects in workmanship and materials' . . . . [T]he language thus employed is that peculiar to goods, not services.").

Like the contracts in Tivoli Enter. and Bonebrake, the Agreement contains the following warranties on the good: (1) the Equipment will be free from defects for 12 months after acceptance, and (2) Cax will fabricate the Equipment according to a set of agreed-upon specifications. These warranties suggest that the Agreement's predominant purpose was the sale of a good.

Unlike the contract in Tivoli Enter., however, the Agreement also contains warranties on services: If a warranty defect arises, Cax's service representatives will be available to help within 24 hours after Leo reports the problem. But having warranties on services does not preclude a finding that the transaction falls under Article 2 of the ICC. See, e.g., Republic Steel v. Pa. Eng'g Corp. 785 F.2d 174, 181 (7th Cir. 1986) (holding that Article 2 of the ICC governed a contract

containing warranties on goods and services because the latter were incidental to the former). A court would likely hold that the service warranties in the Agreement ultimately exist to ensure the proper functioning of the Equipment. Therefore, the warranties indicate that the services in the Agreement were incidental to the sale of a good.

iv. Did Leo have to pay sales taxes?

Adding a sales tax to the contract price can also shed light on a transaction's predominant purpose. See Meeker,442 N.E.2d at 923 ("The plaintiff charged a sales tax on the total value of the contract. . . . [This sales tax] signif[ies] that a sale of goods was predominant and services incidental."); Tivoli Enter., 646 N.E.2d at 948 ("[A sales] tax is found in the sale of goods, not services."). In Tivoli Enter., a contract for the purchase and installation of replacement bowling lanes specified a total sales price of $74,655, which included a sales tax. Id. Because the contract specified a sales tax, the transaction was deemed to fall under the ICC. Id.

Unlike the Meeker and Tivoli Enter. contracts, the Agreement does not mention a dollar amount of sales tax, much less add sales tax when calculating the final price. Instead, the Agreement states that Leo is responsible for "all taxes, charges, import, duties, assessments, or other charges lawfully levied or assessed by Hawaii." While the Agreement does not specify a dollar amount for taxes, Cax and Leo must have contemplated that Hawaii could have conceivably imposed a sales tax on the transaction. This provision, however, could be taken as evidence that the transaction was predominantly for the sale of a good.

v. How individualized and extensive were the design services Cax provided?

The type and extent of design services provided are other factors that courts in Illinois examine when assessing whether a contract falls under Article 2 of the ICC. If a contract does not involve extensive and individualized designing, it may be primarily for goods.

The court in Bob Neiner Farms held that a contract for the erection and purchase of a farm machinery shed fell under Article 2 in part because it did not involve a complex and unique design. 490 N.E.2d 257, 258 (Ill. App. Ct. 1986). The court explained, "[T]he subject structure was of a type requiring noncreative, formula-like construction. While the object of each of the contracts was the erection of one or more structures with design specifications, neither contract required the builder-seller to provide detailed individual designing." Id.

Unlike the farm machinery sheds in Bob Neiner Farms, the Equipment was not based on a cookie-cutter design. Designing the Equipment, as the Agreement and specifications show, was a complex endeavor; the parties held a design conference, and Leo received updates from Cax throughout the design process. Therefore, the holdings in Bob Neiner Farms and Nitrin suggest that Article 2 does not cover the Agreement.

But there are instances where the design services provided are extensive and yet the transaction still falls under Article 2. See, e.g., Republic Steel,785 F.2d at 176. In Republic Steel, the plaintiff contracted with the defendant to design, manufacture, and install two furnaces in a steel mill. The court acknowledged that the design and engineering services were substantial. Id. at 181. It held, however, that "the heart of the Agreement" was the sale of the two furnaces and that the rendition of other services was incidental. Id. at 182.

The transaction between Leo and Cax is most analogous to the one in Republic Steel. Leo contracted with Cax to design, fabricate, test, deliver, install, and sell the Equipment. Similarly, in Republic Steel, the parties entered into a contract for the design, manufacture, and installation of two furnaces. In both cases, the design services were substantial, but at the "heart" of both transactions was the sale of a product.

CONCLUSION

Leo and Cax engaged in a transaction that likely falls under Article 2 of the ICC. First, the Equipment meets Article 2's definition of "goods" because it was movable and identifiable to the contract no later than when Cax shipped its components to Leo's manufacturing complex in Hawaii. Second, although the Agreement included the provision of services to Leo, the predominant purpose test indicates that the purchase was mainly for the sale of goods and that services were likely incidental: (1) the Agreement refers to Leo as "purchaser" and Cax as "seller"; (2) the Equipment's title passed to Leo upon delivery at the Hawaii facility; (3) the Agreement contains warranties on the Equipment; and (4) while the transaction involved substantial design services, they were incidental to the sale of the Equipment. Therefore, the transaction was predominantly for the sale of a good and falls under Article 2 of the ICC.

Applicant Details

First Name	**Ariel**
Middle Initial	**L**
Last Name	**Murphy**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**2016692824**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2018**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of Employment and Labor Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.